105 I.A.2-111

53025

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs FANNIE STAPLES, ROBERT STROM, DOUGLAS BRYANT, FRANK DITTO, EUGENE HARRIS and WILLIAM DARDEN, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Honorable Maurice W. Lee, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

After a jury trial, the defendants, Mrs. Fannie Staples, Robert C. Strom, Douglas Bryant, Eugene Harris, William Darden and Frank Ditto were convicted of criminal trespass to land, a violation of Ill. Rev. Stat. (1965), ch. 38, §21-3. After motions for a new trial and in arrest of judgment were denied, judgments were entered. Mrs. Staples was fined $5.00; Ditto was fined $100.00; Strom, Bryant, Harris and Darden were sentenced to ten days in the county jail, the maximum under that statute. The jail sentences have been served and the fines have been paid.

Within one month, the defendants filed a motion to vacate the judgments and dismiss the complaints alleging that the trial magistrate prior to the ruling on defendants' post trial motions and sentencing, had engaged in a private extrajudicial investigation, denying them their right to due process of law and to be judged by a fair and impartial judge, independent of outside influence. The People insist there was no private investigation by the trial magistrate that denied the defendants their rights and that they were not denied the right to be tried by a fair and impartial judge. On October 4, 1966, the trial magistrate, without informing the defendants or their counsel wrote a letter concerning this case to the Corporation Counsel. In the letter the magistrate mentions that the jury indicated its displeasure to him regarding the conduct of a Public Aid office and its Director,

who was also the complaining witness. The letter also identifies two of the defendants by name. Notations made on a copy of this letter, subsequently obtained by the defendants, indicates that the magistrate then conferred regarding this case, prior to ruling on the pending motions, with one or more officials of the Cook County Public Aid Department on whose property defendants allegedly trespassed and whose supervisory employee signed the complaint. The notations state inter alia, that at the time of the above conference a Public Aid official "gave him, (the magistrate) our (the Public Aid Department) thinking on the situation which he (the magistrate) accepted."

When the defendants presented their motion to vacate the judgment and to dismiss the complaints, based on the foregoing investigation, and in the alternative, for a hearing as to the details of the magistrate's private communications, the magistrate declined to hear the argument of counsel. The defendants say that as a consequence they have no way of knowing the details of the magistrate's private communications or the extent to which there were other private communications by the magistrate.

We agree with the defendants that the record establishes that there was a private extrajudicial investigation by the magistrate and that fact standing alone requires reversal of the judgments. The private investigation by the magistrate occurred after the verdict and before hearing and deciding the defendants motions for a new trial and in arrest of judgment. The defendants did not learn of the private communications until after the decision on the motions for a new trial. Immediately upon learning of the communications the defendants attempted to obtain a hearing to explore the nature and details of the private communications, but the magistrate rejected the motion without allowing any argument. The judgments here must be reversed even if it be

assumed that the private communications by the trial magistrate were innocent in nature. As was stated in People v. Rivers, 410 Ill. 410 at 416, 102 N.E. 2d 303 at 306 (1951):

> "The law is well settled that, exclusive of certain matters of which the court may take judicial notice, the deliberations of the trial judge are limited to the exhibits offered and admitted in evidence and the record made before him in open court. Any private investigation by the court, either during the trial of the cause or while the motion for new trial is pending, constitutes a denial to the defendant of the constitutional guarantee of due process of law. (People v. Cooper, 398 Ill. 468.) The defendant in any criminal proceeding has an inherent and constitutional right that all proceedings against him shall be open and notorious, and in his presence, and any inquiry or any acquisition of information or evidence outside of open court and outside of the presence of the defendant is prejudicial error. The defendant cannot be expected to know the scope and extent of any private inquiry made by the court outside of open court and he is not required to inquire into such matters and to resort to extraneous proof to show that he has been prejudiced. He has a right to rely upon his constitutional guarantee that nothing shall be considered against him except the competent evidence introduced in open court, in his presence, by the witnesses who confront him.
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> * * *
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> "The question here is simply, does this record show any private investigation whatsoever by the court outside the presence of the defendants. If it does, we must find prejudicial error, or we will throw open the door to such private investigations and throw the burden on defendant to show actual prejudice."

See also People v. Cooper, 398 Ill. 468, 75 N.E. 2d 885 (1947); People v. McMiller, 410 Ill. 338, 341-42, 102 N.E. 2d 128 (1951).

Since the defendants have served their sentences no good purpose would be served by another trial. Therefore the judgments are reversed.

JUDGMENTS REVERSED.

BURKE, J., and MC NAMARA, J., concur.

105 I.A.2/32

No. 50789

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

JOSEPH HENDLER, a minor, by ABRAHAM HENDLER, his father and next friend, and ESTHER HENDLER, a minor, by ABRAHAM HENDLER, her father and next friend,	)	
Plaintiffs-Appellants,	)	
v.	)	Appeal from the Circuit Court of
MIRIAM WOLOZIN, NAT WOLOZIN, CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, and HARRY J. ZANOTTI,	)	Cook County, Illinois.
Defendants-Appellees.	)	Hon. Thomas C. Donovan

MR. PRESIDING JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT.

The plaintiffs appeal from an order of the Circuit Court of Cook County entered upon a jury verdict in favor of all defendants and a special finding that all defendants were not negligent and the denial of post trial motions. This appeal is based on the contention of the plaintiffs that they were denied a fair trial by the improper conduct of counsel for the defendants during the trial, improper final argument, and error by the trial court in the admission of certain evidence and the instructions to the jury.

On January 24, 1962, Joseph Hendler, then age 7 years, and his sister, Esther Hendler, age 12 years, were returning home from

the Arie Crown Hebrew Day School on a bus owned by the defendant, Chicago Transit Authority, and driven by defendant, Harry J. Zanotti. The children had boarded the bus at the intersection of Foster and Kimball Avenues near the school. The bus proceeded north on Kimball Avenue to the intersection of Hollywood Avenue where it stopped south of the south crosswalk of Hollywood to permit passengers, including the Hendler children, to alight. Esther Hendler testified that she, Joseph, and a school friend, Judy Zimmerman, got off the bus at the front door, stepped on a snowbank on the south sidewalk east of the curb and stopped to allow the bus to go on before they crossed Kimball Avenue to the west on their usual route home. While they waited for the bus to pass, Esther saw the bus driver wave his hand to them to cross the street. Esther took Joseph's hand and began to cross the street with her brother to her right and Judy a step or two behind. She hesitated "a little past" the front corner of the bus to observe traffic from both directions and noticed the back end of the bus was sticking out into the center of the street at an angle from the front and that a car was coming around the bus "very fast." At this moment, Esther heard the motor of the bus and thought she saw it begin to move and was "frozen" to the spot. The car driven by the defendant, Miriam Wolozin, struck her left hand and then the back of Joseph's head with the front right side. Judy Zimmerman testified to essentially the same facts.

Yetta Scheinbaum testified for the plaintiffs that she was a school mate of the Hendlers and was still on the bus after they got off. She saw the bus driver wave his hand and then heard him swear and other children on the bus say that the Hendlers were struck by a car.

Pesal Rand, a student at the Chicago Jewish Academy, sat next to Yetta on the bus and also saw the driver motion with his hand for people to cross the street.

Miriam Wolozin was the only witness produced by the Wolozins. She stated that she was traveling north on Kimball Avenue going 15-20 miles an hour. She noticed the bus stopped at the intersection and proceeded to pass it on the left in the inner northbound lane at about the same speed. As she passed the bus into the crosswalk she saw "a flash on the right in front of the windshield on the right front fender". She stopped in the middle of Hollywood but then pulled across the intersection.

Harry Zanotti testified that he stopped the bus parallel and about 2-2 1/2 feet from the east curb to permit his passengers to alight. He saw the Hendler children get off and attempt to climb the snowbank. They walked to the front of the bus and "then the girl threw her left arm around the little boy and they dashed across the street". He looked in his side view mirror and saw the Wolozin car coming up along the side of his bus at about 20 miles per hour and shouted "No, no, don't" before the impact. He denied that he waved to the children to cross.

Martin Levy was subpoened by the Chicago Transit Authority and testified that at the time of the accident he was a student at the Y. M. C. A. School and was a passenger on the bus. When on the witness stand he did not recall the incident clearly until his recollection was refreshed by a statement he had given to an investigator shortly after the occurrence. He then recalled that he saw Joseph Hendler "dart" in front of the bus and into the side of the car. He also testified that

he kn ew the Hendlers.

Esther Berzon sat right behind Zanotti at the time of the accident and noticed nothing in particular until she heard him say "Oh, no". She did not see the accident or Zanotti wave his hand.

Esther Hendler was not seriously injured by the accident but Joseph suffered extremely serious injuries that included two surgical removals of brain tissue and permanent brain damage.

Although this case is not appealed on the issue of the weight of the evidence, it is necessary to have reviewed these portions of the evidence to properly assess the nature of the plaintiffs' appeal.

During the cross-examination of Yetta Scheinbaum she testified that she had been interviewed in an office at Arie Crown School shortly after the accident and that other children had been interviewed at the same time. Pesal Rand stated the same thing and when asked by counsel for the Chicago Transit Authority if the interviewer was representing the Hendlers she answered "I think so".

In his final argument, counsel for the Chicago Transit Authority stated that it was during this "conference" at the school "was born the idea that Zanotti waved these children across the street". The plaintiffs maintain that this remark, together with certain other inferences made by the counsel for the Wolozins in regard to the interviews at the school, clearly implied that the school children had been induced to testify to a state of facts that were not true, i.e. subornation of perjury. Counsel for both defendants also commented on the reluctance of the witnesses Martin Levy and Esther Berzon to testify and implied

that Levy's memory of the events was perhaps influenced by his friendship with the Hendler family. The plaintiffs argue that these improper remarks charged them in the eyes of the jury with tampering with witnesses. The defense further brought out that both Levy and Mrs. Berzon were Jewish and since that fact was irrelevant to the issues of the case the plaintiffs feel it was for the purpose of creating the impression that the plaintiffs, the witnesses, including Levy and Esther Berzon, the medical experts and the plaintiffs' attorneys, all related by common religious and cultural backgrounds, had entered into an unholy conspiracy against the defendants and thereby clearly prejudiced the plaintiffs and denied them the fair trial to which they were entitled.

The record before us indicates that the trial was a lengthy and arduous one and that all counsel aggressively served the interests of their clients. In his final argument, counsel for the plaintiffs stated that the defense "developed" their "version" of the facts that Joe Hendler had run out in front of the bus and that "a lie has been used to create an issue of fact". Great emphasis on the religious background of the school children and their families was made by the counsel for the plaintiffs both in the evidence and in final argument. Certainly, much of the argument of the defense was improper but objections to it were promptly sustained by the trial court. Ordinarily, the scope of final argument is within the judicial discretion of the trial court. Jackson v. Whittinghill, 39 Ill. App. 2d 315, 324. It is also the function of the trial court to determine if improper argument is of such a character, when considered with all the circumstances of the case as to prejudice the defeated party. Eizerman v. Behn, 9 Ill. App. 2d 263, 288; Crutchfield v. Meyer, 414 Ill.

210, 213, 214.

We do not feel that the plaintiffs were prejudiced in this case by the arguments of defense counsel when the record is reviewed as a whole. Certain portions of that argument were improper but were not sufficiently serious to warrant a retrial of the case.

Police Officer Bernard Leonard was assigned to make an investigation of the accident and testified for the plaintiffs. In order to refresh his recollection, he was permitted to examine the police report he had prepared from his investigation. The record indicates that during his testimony he held the original of the police report in his hand and that counsel for the plaintiffs held a photostatic copy. Leonard testified as to the position and description of the vehicles and was then asked "To whom did you talk? Do not tell us what anyone said." Leonard stated that he went into the bus and talked to the driver and a CTA supervisor and that "After talking to the bus driver I said I thought they were involved. . ." He then talked to Miriam Wolozin and although admonished not to repeat the conversation he indicated on his report "what she saw prior to striking the two children, and the action of how far her car went after striking the children, how fast she was driving."

On cross-examination, counsel for the Wolozins asked to see the report held by Officer Leonard and was given a copy. The following colloquy then took place relative to the conversation with Miriam Wolozin:

> "Q. By the way, did she tell you whether or not she saw the youngsters before the impact?
> Mr. Karlin: Object to that, if the Court please, unless it is yes or no.
> The Court: I am going to let the witness answer that.
> The Witness: A. She said she saw them, yes.
> Mr. Hubbard: Q. How far away did she say they

were when she saw them?
Mr. Karlin: Object on the same ground, if the Court please.
The Court: I am going to let the witness answer. I think we will allow him to answer these questions.
The Witness: A. The driver said she saw them about five feet away from the front of her vehicle."

Counsel for the Chicago Transit Authority asked Leonard if there was anything in his report to show that they were involved in the accident to which he replied:

"The Witness: A. There is nothing in my report that states that the CTA would be involved."

It is certainly true as contended by the plaintiffs that a police report is ordinarily not admissible in evidence as a violation of the prohibition against hearsay testimony. Redding v. Schroeder, 54 Ill. App. 2d 306, 314; Johnson v. Plodzien, 31 Ill. App. 2d 222, 227. However, the record here indicates that the witness testified directly from his report and the defense was entitled, and permitted, to cross-examine him as to its contents. The cross-examination as to the conversation with Miriam Wolozin was proper although it brought out certain self-serving statements since that conversation was brought out in the direct examination. Similarly, the conclusion of the witness that the Chicago Transit Authority was not "involved", otherwise completely improper, came into the case as a result of his testimony on direct examination that it was his original opinion that they were involved.

Finally, the plaintiffs argue that the instructions to the jury were improper in that they failed to instruct the jury as to the duty of care imposed on a minor. The Court gave four so-called "burden of proof" instructions, one in regard to each defendant, identical to the Illinois Pattern Instruction No. 21.02 that includes the statement "First,

that the plaintiff before and at the time of the occurrence was using ordinary care for his own safety." Although the Court hadpreviously given plaintiffs' instruction No. 9, in the form of I. P. I. 10. 05, properly defining the duty of care of a minor, the plaintiffs believe that the failure to specify the degree of care in each burden of proof instruction was reversible error since the jury would be confused by the inconsistent statements of law. We disagree. The jury was properly instructed as to a minor's duty of care and the subsequent instructions could in no way be considered inconsistent or incorrect. To redefine that degree of care in the burden of proof instructions would have been at the least redundant and defeat the purpose of the pattern instructions to state the law as concisely and understandably as possible.

The other points raised by the plaintiffs in this appeal relate either to the improper conduct of defense counsel that we have already considered or to the medical evidence which, in view of the verdict, is not properly before this court.

For the reasons stated, the judgment of the trial court will be affirmed.

JUDGMENT AFFIRMED.

MORAN and SEIDENFELD, JJ., concur.

51440

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. TOMMY NICKELSON, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JAMES J. MEJDA Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Tommy Nickelson, the defendant, was indicted for rape; he was tried before a jury on January 10, 1966, found guilty and sentenced to the Illinois State Penitentiary for a minimum of two years and a maximum of eight years.

On May 25, 1965, Cleandress Hines was raped and robbed by a man armed with a knife in the vestibule of the apartment building in which she lived. She reported the attack immediately and the police came to her apartment at once.

According to Mrs. Hines' testimony, she lived at 6225 South University Avenue, in Chicago, with her husband and two children. On the evening in question she had taken a cab from her cousin's home at about 10:00 o'clock; she left the cab at the corner of 63rd and University, and started walking north on the east side of the street towards her home. While she was walking she took from her purse the change she had received from the cab driver and put the money in her bra. She reached the building where she lived and was in the hallway looking for her keys when she noticed a man coming to the door. He had a knife in his hand and he said, "This is a robbery," and that he wanted the money she had put in her bra.

The witness started screaming; the man knocked her against the wall, snatched her purse, taking out the coin purse, and told her not to scream any more. At that point the witness

tried to reach the hall door and the man closed it, telling her to look for her keys and open the inner door. When they entered the inner door she started screaming again and he put his hand over her mouth, saying if she screamed again he would "let her have it"; that he wanted the money. The man then snatched her blouse, broke her beads and searched until he found the money in her bra. He ordered her to undress, and when she was too slow in doing so he tore off her girdle and underclothing; he then told her to go to the first landing where he told her to lie down and, with the knife still in his hand, raped her. When he thought he heard someone coming down the hall, he jumped up; the witness started to scream again, and ran for her apartment. She stated that the entire incident took place in about five or eight minutes; that the hallway was brightly lighted, and that during the entire time she was looking at the assailant, and that he was the man [the defendant] she saw that day in court.

Mrs. Hines further testified that when she reached her apartment she called the police; that when they arrived she described the man who attacked her, after which they took her to Billings Hospital. She had described the assailant as tall, of thin build, wearing a thin mustache; that he was between 14 and 25 years of age, between 5'10" and 6 feet tall, weighing "somewhere over 125 pounds"; that he was neatly dressed in a dark "continental" suit, wore horn-rimmed glasses, and "processed" hair.

Mrs. Hines testified that she had been told by the police to come to the Burnside Station to look at some photographs and movies showing persons of various ages and heights, for the purpose of aiding in the apprehension of her assailant. She looked at "mug books" for a couple of hours on the day

after she had been attacked; she did not see a picture of the assailant, but found one of a person who resembled him, and she told the officers it was not the man who attacked her, but it was the only picture she saw that even resembled him. She had not been told to look for a positive identification, but to look for a resemblance. She told the police there was a difference in the hair, ears and eyes of the man whose photograph she saw and the assailant.

Mrs. Hines testified that the next time she saw the assailant was on June 6, 1965; she was returning from church on a rainy Sunday afternoon at about 2:30, when she saw him on the corner of 63rd and University. She called the police from a drugstore and waited in the rear of the store until Officer Kenneth Cox arrived; she pointed out to him the defendant who had come into the store, and the officer talked to the defendant and arrested him. Mrs. Hines stated that at the time she noticed the defendant's thin mustache, his horn-rimmed glasses, the "processed" hair, and the closeness and the blinking of his eyes, all of which she had noticed on the night of the attack. She testified that the man who was arrested in the drugstore was the man who attacked her and that he was the defendant.

Officer Cox testified that on June 6, 1965, in response to a call, he and his partner, Officer Tyree Fuller, went to the drugstore previously mentioned, where he saw Cleandress Hines in the rear of the store. She beckoned to him and he went to her and asked her to identify the person about whom she had called the police. When she pointed him out Officer Cox went to the defendant and questioned him in the presence of Officer Fuller and Mrs. Hines. Officer Cox stated that he noticed the defendant had the same physical characteristics Mrs. Hines had described to the police. The defendant denied

that he was the assailant, and told the police he was twenty-three years old. The officer estimated his height to be 6'2" and his weight about 163 pounds.

Officer John Downey testified that after Mrs. Hines had called the attention of the police to the picture in the "mug book" he investigated and found that the person in the photograph was in the House of Correction on May 23, 1965. Officer Downey had asked Mrs. Hines to come to the station to see if she could find the defendant's picture or a picture of anyone who had characteristics similar to the defendant.

Tommy Nickelson, the defendant, testified that on May 23, 1965, the date of the assault, he was at the corner of 63rd and University, waiting for his friend, Amos Wells, to pick him up. He pointed out a man sitting in the courtroom as Amos Wells. He stated that Wells picked him up in his car; that there was another man with them, and the three went to a tavern at 63rd and Normal, where they spent some time talking with the bartender. They then went to a lounge at 1049 West 59th Street, where Wells played in the band, and where they stayed until 4:00 a.m. The defendant denied that he had robbed Mrs. Hines or had an act of sexual intercourse with her. He further testified that at the time of his arrest he was living with a girl friend, Dorothy Minnefield.

Defendant's friend, Amos Wells, did not testify although present in court.

The defendant first argues that the trial court committed reversible error in permitting the State to comment on the failure of defense to produce Wells as a witness. In the closing argument the State had said that after the defendant had testified he was at a lounge with Wells, he had said that Wells was sitting in the courtroom. The State's Attorney said:

"Yet did he take the stand and say that he was with Mr. Nickelson at the crucial time in question?" He further said: "It doesn't make sense. That is probably why Mr. Wells didn't get on the stand. Mr. Wells knows the penalty for perjury, and Mr. Wells does not like Tommy Nickelson that much that he would want to get up and lie for him, and I can't blame Mr. Wells."

In People v. Lenihan, 14 Ill. App. 2d 490, the court said at page 492:

> "Where the defendant injects into a case his activities with a potential witness during a particular period of time ostensibly for the purpose of proving his innocence of the crime charged, his failure to produce such witness is a proper subject of comment upon the part of the state."

Also see People v. Lion, 10 Ill. 2d 208. The defendant cites People v. Munday, 280 Ill. 32; and People v. Rubin, 366 Ill. 195, both of which cases are not in point on their facts. The defendant made no objection to either of the statements concerning which he now complains, and it has been held repeatedly that an alleged error involving improper closing argument by the State is not subject to review without a timely objection in the trial court. People v. Canada, 81 Ill. App. 2d 220; People v. Velez, 72 Ill. App. 2d 324; People v. McElroy, 30 Ill. 2d 286.

However, defendant also cites People v. Smith, 74 Ill. App. 2d 458, in which the court held that an objection need not be made to preserve the error for review if the result of the error is "of sufficient gravity to affect the substantial right of defendant to a fair jury consideration of his alibi defense." In that case the defendant, who was convicted of armed robbery, argued that the State's Attorney commented unfairly on the absence of an additional alibi witness—a Mrs.

Griggs. Her husband testified that the defendant lived in the same apartment building in which he and his wife lived; that on the day the robbery was alleged to have occurred at 10:30 a.m., Mr. and Mrs. Griggs had borrowed defendant's car; that during the hour they were gone there was trouble with the car and they telephoned the defendant to inform him, then took a cab home, arriving at about 10:00 or 10:15 a.m., where they found the defendant in his apartment. He stayed in his apartment until someone came to help him with the car. [Mrs. Griggs was not called to testify.] The State's Attorney made the following statement [page 462]:

> ". . . you can't tell me Mrs. Griggs who, unquestionably, would be the most honorable of the defense witnesses who testified, if Mrs. Griggs had in fact been there and could say it was that day, the 12th of December, if she could say absolutely, positively it was that day, the 12th day, she would have been here, no question about that, there is subpoena power, the judge would issue a subpoena and bring her in and put her on the stand, no question about it, if Mr. Engelland [defense counsel] desired, no question in the world. But she didn't come in here."

The court held that the comment was unjustified and highly prejudicial to the defense, and reversed and remanded the case. The court said at page 464:

> "Therefore, not only was it unfair for the State to infer that, if called, Mrs. Griggs' testimony would be injurious to the defense, but there was also far less than the candor required of an attorney in the implicit implication that the State was without power to bring in this witness."

The court further held that the result of the State's statement was of sufficient gravity to affect the substantial right of the defendant to a fair jury consideration of his alibi defense.

In the instant case, while the argument of the State was improper, it did not have the gravity of the argument in the Smith case, and consequently, the cause should not be reversed in the absence of timely objection.

The defendant also argues that there was reversible error in the State's Attorney's comment on the fact that the defendant was living in common law with a woman. This matter was first brought into the closing argument by defense counsel when he said that the defendant at the time "was living with this woman, common law. He could have sex any time he wanted it. Does he have to take it from Mrs. Hines? . . . Can you reason why he would want to have sexual intercourse with Mrs. Hines when he could have it from his common law wife?" ["Common-law wife" in this State has no meaning.] The State's Attorney said that while the defendant was not on trial because of living with a girl friend, he thought the jury should take into consideration certain facts and certain implications from that fact. This statement was objected to and the objection was overruled.

In People v. Smith, 24 Ill. 2d 198, the prosecutor referred in his argument to an illicit affair between defendant and the wife of the deceased. There was evidence that she had been staying with the defendant. The court held that it was not improper for the prosecuting attorney to reflect unfavorably upon the defendant if the remarks were based upon competent evidence properly in the record.

In the instant case the prosecutor was replying to an extreme argument made by defendant's counsel, and the comment was proper.

Defendant objects to the statement by the State's Attorney in his argument that defendant on the night in question acted like an animal "because he lives like an animal." No objection was made to this statement, but the defendant argues that the court on its own motion should have stopped the State's Attorney, even though no objection was made. However, in People v. Wright,

27 Ill. 2d 497, the court said it was proper for the prosecuting attorney to reflect unfavorably on the accused "and to denounce his wickedness and even indulge in invective." In People v. Mackey, 30 Ill. 2d 190, where the defendant was being prosecuted for the crime of rape, the State's Attorney in his closing argument characterized the defendant as an animal and no objection was made. The court held that while the court has a right to consider an assignment of error without objection if the argument is so seriously prejudicial as to prevent the defendant from receiving a fair trial, and that while the prosecutor's remark was improper, under the facts in the case it was not reversible error.

In People v. Oparka, 85 Ill. App. 2d 33, a prosecution for rape, the prosecutor characterized the defendant as a savage, and the court held it was not improper for counsel to characterize defendants as savages in view of the evidence of their overall behavior on the night in question. That same rule should apply in the case before us.

The defendant also argues that it was reversible error to permit the State to comment in its closing argument on the photograph which Mrs. Hines had picked out as one similar to the defendant. The defendant tried to introduce the photograph in question to indicate that there was dissimilarity between himself and the man in the picture. The court refused to permit the introduction of the photograph without introducing the written description which accompanied it. During his argument the State's Attorney referred to the photograph and told the jury they would have a chance to view it; that they would find there was great resemblance between the defendant and the man in the photograph. No objection was made to the argument, and as we have pointed out, it has been repeatedly

held that without such objection, alleged error of this type is deemed to have been waived. The photograph was merely cumulative and did not constitute a material link in the chain of guilt. It is true that there was an inadvertent error on the part of the State's Attorney in referring to it, but it does not constitute reversible error.

The defendant argues that the State's Attorney committed reversible error when he explained, in commenting on the identification of the defendant by Mrs. Hines, that the selection of a police photograph of another man was for the purpose of establishing likeness only, and not for positive identification. The State's Attorney said:

> "She never told you that she made a positive identification. Now, Defense counsel tried to get this fraud across to you even though it is not in evidence, and we are asking you to consider only the evidence."

However, there is no evidence in the record that Mrs. Hines identified the photograph as a picture of the defendant. The testimony of Mrs. Hines and that of the police officers indicated that the only purpose in selecting the picture was to provide them with a resemblance to the person she alleged committed the rape. In his closing argument to the jury the defendant made the following statement:

> "Why do you think, ladies and gentlemen, that the officer wanted to ascertain the whereabouts of the man whose picture that was? She says only because there was some similarity. Well, do you think the police officer would have gone through the bother of finding out where the man was if it was only a similarity?"

This argument is so puerile that it does not require a reply. However, the State was justified in making the comment which was made. See People v. Woodley, 57 Ill. App. 2d 380; People v. Burnett, 27 Ill. 2d 510, in which cases the court condemned

the statement made by the State's Attorney, but held it was not so prejudicial as to require reversal.

The evidence in the case before us was sufficient to prove the defendant guilty beyond a reasonable doubt. The identification of the defendant was sufficient. Defendant argues that the witness could not positively identify him because, while she saw him for eight minutes, she saw him "only in a situation which compels the breakdown of normal functioning." Defendant's contention here is that the circumstances under which he was identified raise more than a reasonable doubt as to his involvement in the crime. If we followed this contention there could never be a positive identification made in a rape case. The witness saw the defendant for about eight minutes in a hallway and a landing, both of which were well lighted. The fact that there were no corroborating witnesses is not material. It has been repeatedly held that the testimony of one witness alone, if positive and the witness credible, is sufficient to convict, even though the testimony is contradicted by defendant. People v. Arnold, 2 Ill. 2d 92; People v. Holt, 25 Ill.2d 313.

In the instant case the witness' testimony as to identification of the defendant was positive. She observed him under conditions which permitted a positive identification. The defendant was convicted beyond a reasonable doubt. The judgment of the Circuit Court is affirmed.

AFFIRMED.

LYONS, P.J., and BURKE, J., concur.

52890

105 I.A.2 167-1

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
	)	CIRCUIT COURT,
vs.	)	
	)	COOK COUNTY.
FRANK SARELLI, Defendant-Appellant.	)	HON. RICHARD J. FITZGERALD, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the unlawful sale of narcotics and was sentenced to a term of ten years to ten years and one day in the State penitentiary. He appeals, contending that he was not proved guilty beyond all reasonable doubt.

Miss Jeanne Clark, a student at the Chicago Art Institute, testified that on March 1, 1966 she resided at a hotel in the 800 block of South Wabash Avenue in Chicago. Approximately 9:00 P.M. on that date she entered a sundry store located at 732 South Wabash Avenue, which she had patronized on several occasions in the past, to purchase cigarettes. Defendant Sarelli, the owner and operator of the store, was behind the service counter. Upon observing a display of a certain brand of candies on the counter, Miss Clark stated she remarked that the sponsor of the candies was "making everything now." Defendant laughed and began conversing with Miss Clark concerning the sponsor of the candies, to which Miss Clark ultimately replied, "If [he] did everything he supposedly has done, he would have had to have been on dope."

The substance of Miss Clark's testimony as to the conversation with defendant which ensued following these initial remarks is as follows:

Defendant asked Miss Clark if she knew much about narcotics, to which she replied, "Not very much, except that it's not a very good thing to fool around with." Defendant spoke of the various types of narcotics and stated, "Would you believe that I'm high

right now? . . . I'm on cocaine," Miss Clark then stated she had been to a party where persons in attendance were "popping pills," to which defendant replied, "Why don't you get me invited to some of these parties." Miss Clark told defendant that she understood that some of the persons in attendance at the party were "in business" and that they might not appreciate the presence of defendant, to which defendant replied, "Well, I'm in business, too." Defendant then asked Miss Clark whether she had ever taken narcotics, to which she replied, "No." Defendant suggested that she return to the store when she had more time and stated, "We'll try something out. . . .You'll have some fun." Miss Clark then said goodnight and left the store.

Miss Clark contacted the police who met with her at her hotel the following evening. Officers Hartnett and Davillo contacted Miss Clark on the afternoon of March 4, 1966, after school classes, and transported her to police headquarters at 11th and State Streets where she was searched by a police matron and given $10 in pre-recorded funds. Approximately 3:30 P.M. she was transported to defendant's store by Officers Hartnett and Davillo to attempt a purchase of narcotics from defendant. After she entered the store Miss Clark was told by defendant that she could not "get anything" for $10 and suggested that if she would return later that evening with $25 she might be successful in making a purchase of narcotics. Miss Clark agreed and left the store.

The pre-recorded funds were returned to the officers and they drove her back to school. At 7:00 or 7:30 P.M. that evening Miss Clark was again transported to 11th and State Streets by the officers where she was again searched and given $25 in pre-recorded funds, in the form of two ten-dollar bills, four singles, one-half dollar and two quarters. The officers and Miss Clark thereupon returned to the vicinity of defendant's store and Miss Clark again entered the store.

She was informed by defendant that he had no narcotics at the time but that he was expecting a delivery in an hour. Miss Clark returned to the police vehicle and rode with the officers for a while, after which they returned to defendant's store between 9:00 and 9:30 P.M.

Defendant's store proper is 40 to 50 feet deep, running east to west, and is 25 feet in width, fronting on Wabash Avenue. Inside the store are three merchandise display racks or gondolas, one along the north wall and one along the south wall of the store, and the third running directly down the center of the store; all three racks run in an east-west direction. There are two long, east-west aisles in the store, running between the three above mentioned merchandise racks, and two short aisles running north to south, intersecting the center merchandise rack. The latter, north-south aisles are situated approximately 12 feet and 15 feet from the front store entrance. The latter north-south aisle, situated approximately 15 feet from the front entrance, runs directly into the south wall merchandise rack at a point where the cash register is located; this aisle shall hereinafter be referred to as the "second north-south aisle."

Miss Clark again entered the store while Officer Martnett remained in the police vehicle which had been parked around the corner from the store; Officer Davillo stationed himself across the street from the store and observed Miss Clark as she entered the store and while she was inside. Miss Clark was told by defendant to wait, and a short while later two men entered and walked to the rear of the store where they engaged defendant in conversation. Defendant thereafter returned to Miss Clark and told her to take a seat behind the cash register. He then went back to the two men and returned with a tinfoil packet which he gave to Miss Clark in return for $24 of the pre-recorded funds which he placed in his pocket. Miss Clark testified she opened the packet and observed green leaves resembling tea leaves. Defendant stated the leaves were "reefers" and that Miss Clark would have to "roll her own." Miss Clark returned to the

police vehicle and the officers field tested the contents of the tinfoil packet which they found to be marijuana. It was stipulated that the packet contained marijuana. The officers told Miss Clark to return to her hotel after delivering the remaining funds to them, and the officers proceeded toward defendant's store.

When the officers entered the store defendant was standing approximately four feet from the cash register near the second north-south aisle. The officers drew their service revolvers and told everyone present to raise their hands and to remain where they were. Defendant and the two men previously mentioned by Miss Clark were told to move into the north east-west aisle and to lie on the floor. They were searched by the officers but the pre-recorded funds were not found on their persons, nor were the funds found in the store's cash register.

A search of the premises was conducted and the funds were located partly on the floor and partly on the shelf of a nearby merchandise rack in the area of the north east-west aisle and the second north-south aisle, near the place where defendant was standing when the officers entered the store. The presence of the money was called to the attention of the arresting officers by one of the officers who had been summoned to transport prisoners. The serial numbers of the funds found were compared to those of the funds given to Miss Clark earlier that evening.

Police Officer Ford was called as a witness by the defendant and testified that he was summoned to the defendant's store on the evening in question to transport prisoners. He stated he observed the pre-recorded money lying on the merchandise rack near the north east-west aisle and the second north-south aisle. He called the presence of the funds to the attention of the arresting officers, who at the time were in the process of searching the cash register, and one of them retrieved the money.

Defendant testified in his own behalf and stated that he had seen Miss Clark in his store on several occasions prior to the date in question and that she entered the store several times on that day. Defendant denied conversing with Miss Clark about narcotics, denied selling narcotics to her, and denied receiving $24 from her in return for narcotics.

Defendant contends that he was not proved guilty beyond all reasonable doubt. He argues that Miss Clark's testimony is unconvincing and further that it is directly and positively contradicted by defendant's testimony. As is evident from the foregoing summary of the evidence the sole question involved is the credibility of the witnesses. The credibility of witnesses and the weight to be given to their testimony is for determination by the trier of fact, and that determination will not be disturbed where, as here, there is ample evidence, if believed, to support the judgment. People v. Jackson, 28 Ill. 2d 37. A conflict in the evidence does not, of itself, require a reversal of a finding of guilty. People v. Greer, 28 Ill. 2d 107.

Miss Clark gave a clear and detailed account of her conversations and transactions with the defendant which was unshaken on cross-examination. This is not a typical narcotics-informer case, and defendant has failed to impeach the credibility of Miss Clark. She having had no prior history of the use of narcotics, was approached by defendant to "try something out" and notified the police. She submitted to two searches at police headquarters and went to defendant's store several times on March 4, 1966 for the purpose of cooperating with the police in effecting a controlled purchase of narcotics from defendant, which she succeeded in doing.

Miss Clark's testimony was further corroborated by that of the arresting police officers, and by the presence of the pre-recorded funds in defendant's store when it was searched after Miss Clark secured the marijuana from defendant. The fact that the two arresting officers testified that defendant was observed standing in the

south east-west aisle of the store near the cash register when they entered, whereas Officer Ford testified that he first observed the pre-recorded funds in the north east-west aisle near the second north-south aisle, does not mean that this evidence has no probative value whatever, as is suggested by defendant. Defendant's store was very narrow and contained three rows of merchandise racks; defendant was first observed by the officers standing approximately four feet from the cash register, near the second north-south aisle, and was told by the officers to move to the north east-west aisle; the money was located near the same north-south aisle where defendant was initially observed; the witnesses were testifying to a very small area with respect to the relative positioning of the defendant, when first observed, and the money. This was a matter of weight and credibility for the trier of fact, and not a matter of the competency as was the situation in the case of People v. Nelson, 18 Ill. 2d 298, cited by defendant. In the Nelson case, which involved a conviction on the charge of possession of narcotics, the Court held the testimony of the two arresting officers valueless, inasmuch as one testified that he observed defendant transfer a package (containing narcotics) to another person inside a building, whereas the other officer testified he observed the package being transferred outside the building.

The remaining cases cited by defendant in support of his position are likewise not in point: People v. Coulson, 13 Ill. 2d 290; People v. Bentley, 357 Ill. 82.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

52931

105 I.A. 2-1673

CARL PENDL,
Plaintiff-Appellee,

vs.

UNITED PARCEL SERVICE,
Defendant-Appellant.

) APPEAL FROM
)
) CIRCUIT COURT,
)
) COOK COUNTY.
)
) HON. GLENN JOHNSON,
Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

This was an action to recover damages for injuries suffered by plaintiff occasioned by the alleged negligence of defendant in the operation of a motor vehicle. The jury returned a verdict in favor of plaintiff in the amount of $2,000; the jury was also tendered a special interrogatory, questioning whether plaintiff was guilty of contributory negligence, which was answered in the affirmative. Judgment was entered on the general verdict, the trial court refusing to enter judgment on the special interrogatory. Defendant appeals.

Plaintiff's action was filed in December 1961 requesting damages against defendant in the amount of $5,000. The case was submitted to the jury on September 27, 1967. Among the matters sent with the jury to the jury room was the following special interrogatory:

> "Before and at the time of the occurrance [sic], was the plaintiff guilty of any contributory negligence which was a proximate cause of the occurrance[sic]?"

On September 28, 1967, after the jury had returned their verdicts, trial counsel met with the trial judge to discuss "what to do with our verdict in this case." The ensuing discussion between the court and counsel centered around the applicability of decisions which hold that a special verdict controls a general verdict, such as Borries v. Z. Frank, Inc., 37 Ill. 2d 263, and the decision of the Appellate Court in Maki v. Frelk, 85 Ill. App. 2d 439, decided in July 1967, which applied the principle of comparative negligence.

The trial court ultimately followed the Appellate Court's decision in Maki, holding that "the answer to the special interrogatory and the general verdict for plaintiff are not inconsistent." The trial court reasoned that plaintiff, in the complaint, requested $5,000 damages from defendant, but the jury, in giving consideration to plaintiff's "lesser degree of negligence," gave him only $2,000. The final comment of the trial court prior to entering judgment for plaintiff was that "plaintiff had asked for $5,000 and the jury awarded $2,000; and the Court feels in the light of Maki that this is not inconsistent."

Leave to appeal in the Maki case was granted by the Illinois Supreme Court, and the determination of the Appellate Court was reversed in July 1968, the Supreme Court stating that the question of whether the doctrine of comparative negligence should be made applicable to legal actions in this State is "one that is appropriate for legislative rather than judicial action." Maki v. Frelk, 40 Ill. 2d 193, 197.

It is well established that a special interrogatory, or verdict, controls a general verdict. Ill. Rev. Stat. 1967, Chap. 110, Para. 65; Borries v. Z. Frank, Inc., 37 Ill. 2d 263; Mathes v. Basso, ____ Ill. App. 2d____(Gen. No. 53180, 1st Dist., 12/30/68.) The trial judge accordingly should have entered judgment for defendant according to the jury's answer to the special interrogatory.

Plaintiff maintains that the trial court "properly acted within its discretion in disregarding the finding on the special interrogatory and entering judgment on the jury's verdict." In support of this position plaintiff cites Freeman v. Chicago Transit Authority, 33 Ill. 2d 103. Although Freeman holds that a trial court may properly set aside the answer to a special interrogatory where it is against the manifest weight of the evidence, no such action was taken by the trial court, nor does the record disclose that the

jury's answer to the special interrogatory was against the manifest weight of the evidence. On the contrary, the trial court impliedly sustained the jury's special verdict by holding that the special verdict and the general verdict were consistent with each other.

For these reasons the judgment is reversed and the cause is remanded with directions to enter judgment for the defendant.

JUDGMENT REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

LYONS, P.J., and MC CORMICK, J., concur.

51441

105 I.A.2 216-1

PEOPLE OF THE STATE OF ILLINOIS, Appellee, vs. OLIVER WILSON, Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. John C. Fitzgerald, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of conviction, after a jury trial, for the unlawful possession of narcotic drugs, with sentence to the Illinois State Penitentiary for a term of not less than seven nor more than ten years.

On March 9, 1965, Detectives William Walsh and Walter Kienzle approached Sam Jackson, a known dope addict. They threatened him with arrest if he did not assist them. This was the first time they had used him in a controlled sale. Jackson agreed to act as an informer and told the police officers he could get the defendant, Oliver Wilson, for them. He was taken to police headquarters at 11th and State where he was searched and handed pre-recorded and fluorescent dusted money, the type used in a controlled sale. He was taken to 4946 South State Street. He entered the building. He returned some ten minutes later with a tinfoil package, which he handed to the officers. The police officers were unable to observe Jackson from the time he entered the building until his return with the tinfoil packet.

At approximately 1:30 A.M., an hour later, Officers Walsh and Kienzle returned to the apartment building at 4946 South State Street in the company of Policewoman Nora Scannell. They first attempted to break into the apartment. Subsequently, however, defendant opened the door and admitted the officers. They placed defendant under arrest. Others present in the apartment were defendant's sister, Marybell Wilson, her five children, defendant's

common-law wife, Nadine Clay, Jackie Miller, a guest at the apartment and Carolyn Branch. Nadine Clay and Jackie Miller were arrested with defendant and taken to the 11th Street Station. Jackie Miller was released at the station and Nadine Clay was discharged at a preliminary hearing. The officers did not write down the names and addresses of Carolyn Branch or Jackie Miller prior to their release.

Policewoman Nora Scannell testified that except for defendant's sister, three of the women in the apartment had track marks on their arms. The apartment was subsequently searched and a bag alleged to contain narcotics was found in a kitchen drawer by Officer Kienzle. This bag of narcotics was the basis for the instant charge of unlawful possession of narcotics.

The trial court allowed the jury to hear testimony regarding the package of narcotics found in the apartment and the package allegedly obtained from the sale. At the close of the State's case, however, only the package of narcotics found in the apartment was admitted into evidence. Defense counsel moved for a mistrial contending that evidence regarding the sale of narcotics related to a different transaction than the possession charge. Defense counsel pointed out that the sale occurred a full hour prior to the seizure of the narcotics in the apartment. The motion was denied.

Marybell Wilson testified that the apartment did not belong to defendant and that he did not reside there at the time of his arrest. She further stated that she leased the apartment from the Chicago Housing Authority with her five children, and at the time of defendant's arrest, Jackie Miller was spending a few days with her as her guest.

Nadine Clay testified that at the time of defendant's arrest, he was living with her at 78th and Emerald Avenue, and on

the previous day she was at Marybell Wilson's house visiting her friend Jackie.

Defendant testified that on March 8, 1965, he lived at 7833 Emerald Avenue; that both he and the informer, Sam Jackson, were addicts and had used narcotics in the past; that when Jackson first entered his apartment, Jackson told him that he was sick and needed narcotics; that defendant replied that he had none; and that Jackie Miller was the one who gave Jackson the narcotics.

In the final argument, the prosecutor pointed out that defendant was involved in narcotics traffic and that he was a dope peddler. He further commented on the narcotics from the alleged sale, People's Group Exhibit number 3, which the court earlier had refused to admit into evidence.

Defendant contends that:

1. He was denied his constitutional rights in that the indictment did not charge a crime;

2. The seizure of the narcotics, in the apartment, was unlawful;

3. The Court erred in admitting prejudicial testimony;

4. The Court erred in permitting other prejudicial evidence;

5. The Court erred in allowing a prejudicial instruction;

6. The Court erred in allowing the State, in final argument, to comment on prejudicial matters;

7. The Court erred in allowing the State, in final argument, to comment on evidence that had not been admitted;

8. The Court erred in allowing the State, in final argument, to deliberately misstate material facts and mislead the jury;

9. He was not proven guilty beyond a reasonable doubt.

Defendant's first contention is without merit. Defendant bases his contention on the fact that the indictment failed to allege knowledge. In the recent case of People v. Mills, 40 Ill. 2d 4, 237 N.E. 2d 697 (1968), the court held that an indictment

does not have to contain an express allegation of knowledge of narcotics in a possession case.

[1] Defendant next contends that the search and seizure of the narcotics was the result of an unlawful search and seizure as information supplied to the police officers was not given by a reliable informer. We disagree. The arrest was lawful because the officer had reasonable grounds to believe defendant had committed the crime of sale of narcotics and was committing the crime of possession of narcotics. Thus, the officers relied on more than the informant's bare statement that he could get defendant. They had previous information about defendant's dealings in narcotics, and they had evidence of a sale of heroin by defendant. The search of the apartment and seizure of the heroin in the kitchen was proper as incidents of a lawful arrest.

Defendant next contends that testimony of the defendant's involvement in other crimes was erroneously admitted by the court to the prejudice of defendant. Defendant's contention is without merit. Evidence of the sale of heroin by defendant an hour before his arrest was admissible as an exception to the exclusionary rule. This exclusionary rule forbids the admission of evidence of a crime independent of and disconnected from the one for which a defendant is charged. It is, however, subject to various exceptions. Relevant evidence of another crime, which places defendant in proximity to the time and place, which aids identification or which tends to prove design, motive or knowledge, is admissible. People v. Tranowski, 20 Ill. 2d 11, 169 N.E. 2d 347 (1960).

In the instant case, evidence of the sale was admissible to show defendant's knowledge, motive and intent in possessing narcotics. The police officers found defendant in an apartment with four other adults and a bag of heroin. Defendant based his defense on the theory that he had no knowledge or control of the narcotics, that he was only visiting his sister's apartment and

that the bag must have belonged to his wife or her two friends, who were also addicts. By offering proof that defendant had sold a packet of heroin to Sam Jackson in apartment 1003 an hour before the arrest and search, the prosecution gave the jury a basis for disbelieving defendant's story. The jury could infer from evidence of the sale that defendant had knowledge of the narcotics and that he had at least joint control of it. See People v. Galloway, 28 Ill. 2d 355, 192 N.E. 2d 379 (1963). The sale provided a motive other than defendant's addiction, for his possession of narcotics. It placed his possession within a criminal scheme of narcotics distribution. The sale also explained the officers' actions in charging only one of the five adults with possession of narcotics.

Defendant next contends that the court, in a trial for possession of narcotics, erroneously allowed the jury to see the bag of narcotics from the alleged sale of narcotics. We disagree with this contention. As pointed out previously evidence of the sale was properly admitted.

Defendant next contends that the court erred in allowing the State's instruction No. 12, which states:

> The court instructs the jury that the defendant is charged only with unlawful possession of narcotics. Evidence, if any, of a sale of narcotics or of any other offense may be considered by the jury only insofar as bearing upon the offense charged.

We disagree with defendant's contention. The instruction properly explained to the jury that they could consider evidence of the sale only for a limited purpose.

Defendant next contends that the court erred in allowing the State, in final argument, to comment that defendant was a dope peddler and was involved in narcotics traffic. We disagree with defendant's contention. The prosecutor argued to the jury:

> I'm going to wind up now. There is not much more I could say. I wind up by quoting Mr. Georges on

> one of the last things he said. But the thing I want to say last is the State has proven beyond a reasonable doubt that this defendant was engaged in the traffic of narcotics. The purpose of his possession may have been for his own use also, but it was also for the purpose of being a link in the chain of the transportation and distribution of narcotic drugs.
>
> The State's case has shown he had the operation there. . . .

The above closing argument was based on properly admitted evidence. The sale was relevant as to whether defendant had knowledge and control of the narcotics found in the apartment. Defendant admitted that he often procured narcotics for the informant. The argument by the State was proper to refute defendant's claim of ignorance about the narcotics seized in the kitchen.

Defendant next contends that it was error for the court to allow the State, in final argument, to comment on the narcotics from the alleged sale where the court had previously refused admission of these narcotics into evidence. We disagree with defendant's contention. The State's comment did no more than remind the jury that the alleged sale was not the primary issue in the case. Defendant did not object to the reference. Furthermore, defense counsel had previously argued that the State's proof of the sale was faulty.

Defendant next contends that the court erred in allowing the State, in final argument, to deliberately misstate material facts and mislead the jury. We disagree with defendant's contention. The prosecutor in final argument commented upon the motives of the informer. He argued that Jackson was a peddler who cooperated with police because he feared they would charge him with a sale of narcotics. This was a logical inference from the evidence, and did not contradict the officer's testimony that they had no evidence against Jackson. Furthermore, it was in accord with the defendant's theory that Jackson turned informer because he felt he would be charged with a sale of narcotics.

Finally, defendant contends that he was not proven guilty beyond a reasonable doubt in that it was never proven, beyond a reasonable doubt, that the narcotics were possessed by defendant either actually or constructively. We disagree. The Supreme Court in People v. Mack, 12 Ill. 2d 151, 145 N.E. 2d 609 (1957) stated:

> It is clear that exclusive physical possession of narcotics is not required for a conviction for unlawful possession. It is enough that the defendant had intent and capability to maintain possession and control.

The presence of the defendant in the apartment and the evidence that he answered the telephone call inviting Jackson to the apartment; that he later gave Jackson a packet of heroin in the apartment, while clad in his T-shirt and minus his shoes and that the police later found his shirt, coat, hat and shoes in a closet in the back bedroom, provided a basis for the jury finding that the defendant had at least joint control and possession of the heroin found in the apartment. Evidence that defendant was not living in the apartment was heard by the jury. We will not overturn their finding.

For the above reasons, the judgment of the lower court is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC NAMARA, J., concur.

51924

105 I.A. 2-210-24

PEOPLE OF THE STATE OF ILLINOIS,
Appellee,
vs.
PAUL DURANT,
Appellant.

APPEAL FROM CIRCUIT COURT COOK COUNTY

HONORABLE EDWARD J. EGAN, Presiding.

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Paul Durant, defendant, was indicted for the crimes of robbery and aggravated battery. He was tried before a jury which returned a verdict of guilty, and the defendant was sentenced to a term of five to ten years in the Illinois penitentiary, the sentence on each count of the indictment to run concurrently.

In this court the defendant complains that he was not properly identified; therefore, was not proved guilty beyond all reasonable doubt; that irrelevant evidence was introduced; that the prosecutor's arguments were improper; and that the defendant was denied a fair and impartial jury. [The defendant offered no evidence whatsoever in the case.]

There is no question that the complainant, Frank Wilkes, had parked his truck on Homer Street, four feet west of Damen Avenue, in the City of Chicago; that he was attacked by two men and a woman, and suffered head injuries, broken ribs and bruises; and that his wallet was taken, with two fives and a one-dollar bill removed from it. Shortly after the crime Officer Victor Hoffman arrested the defendant and James Catalano in an alley east of Damen and 100 feet south of Homer Street, where they were seen at a "T" in the alley, coming from the north and turning west. Defendant's shirt was out and his pants were unzipped. Catalano was carrying one ten-dollar bill and two singles; defendant carried no money.

Dr. William Haines, a psychiatrist, had examined the defendant three months before the trial and reported he was competent to stand trial. The report indicated that the defendant had been in Elgin State Hospital a few months for observation, and had previously been in the hospital from October 24, 1962 to January 24, 1963; the defendant was described as "emotionally unstable."

On July 5, 1966, a sanity hearing regarding the defendant was held before a jury. At that hearing Dr. Haines testified that he had examined the defendant on June 6 and found that the defendant understood the nature of the charges against him and was able to cooperate with his attorney. The jury returned a verdict finding the defendant competent to stand trial.

When the defendant was brought into the courtroom he was struggling with two deputy sheriffs. The trial judge excused the prospective jurors and asked the defendant if he wished to be present at the trial proceeding. The defendant began mumbling and crying, and said, "Leave me alone." The court then held that defendant had waived his right to be present and ordered him removed from the courtroom until he decided to conduct himself properly. The court noted then that the defendant had behaved normally on prior court dates and during the morning in question; that there had never been any outbursts.

The jury was selected from the panel which had observed defendant's outburst, and the court told the jury that the defendant did not choose to attend the proceedings and was in custody. The jury was carefully examined both by counsel and the court as to whether or not the defendant's conduct in the courtroom would have any effect on their verdict, and the only jurors selected were those who categorically answered that it would not.

The first witness for the State was Frank Wilkes, who testified that on April 21, 1966, at about 7:30 p.m., he and his partner unloaded some merchandise at his antique shop at 1944 North Damen Avenue, after which his partner went inside. Wilkes pulled the truck around the corner on Homer Street, about 20 feet from the shop, and at that time some people threw open both doors of the truck and began clubbing him. [He identified the defendant as one of the assailants.] The defendant then struck him twice with a pressure cooker, and the defendant's companion hit Wilkes from the other side; during this time a girl who was with the assailants was shouting, "Grab him, kick him, grab his purse, grab his wallet, kick him hard." The defendant then picked up a hammer and swung it at Wilkes' head; it struck a glancing blow and the head of the hammer flew across the street. The woman then grabbed Wilkes' legs; he fell, and the three persons kicked him as he lay on the ground.

Wilkes testified that after the three had escaped, he noticed that $11.00 was missing from his wallet, as well as a valuable gold coin piece he wore around his neck. Shortly afterwards a squad car arrived and Wilkes got into the car to talk with the officers. At this time another squad car [with the two suspects in it] pulled up and parked about seven feet away. Wilkes was unable to see the suspects well enough to recognize them from that distance. When both squad cars went to the police station Wilkes got out and faced the suspects and identified them as the men who had attacked him.

Wilkes testified that he had jerked a jacket off the defendant when he tried to get away, and that the other man [Catalano] was wearing a dark sweater, either black or maroon. Wilkes stated that during the attack he was

struck on the side four or five times, resulting in swelling, two broken ribs and a swollen ear.

Officer Victor Hoffman testified that he was in a patrol car on April 21, 1966, about 8:30 p.m., when he was stopped by a citizen on North Damen Avenue; that he then went to Damen and Homer, where he saw Wilkes and noted his bruised and swollen neck and torn trousers. After talking with Wilkes, Hoffman and his partner proceeded to an alley south of Homer and Damen, where they saw the defendant and Catalano running out of an adjoining alley; the men were disheveled in appearance, and when searched by the police Catalano was found to have $12.00 on his person; no money was found on the defendant. The defendant was wearing a white shirt, gray trousers with hanging suspenders, and the shirt was outside the trousers. Catalano wore a maroon sweater and dark trousers. The officer placed both men under arrest.

At the trial the State offered in evidence a dark shirt which was found in the alley; this exhibit was objected to but was admitted over the objection.

The first objection made by the defendant in this court is that the identification was suggestive and violated due process of law. During the attack Wilkes had grappled with the assailants; shortly after the robbery he confronted the defendant at the police station, and at the trial he pointed out the defendant as the man who had beaten and robbed him; and he stated that he had seen the defendant a couple of times before in the neighborhood. The defendant claims that Wilkes should have identified him while he was sitting in the squad car; however, Wilkes' explanation of his failure to do so was sufficient.

The defendant complains of the fact that a police officer, prior to the identification at the police station, said to Wilkes: "We have the men who assaulted you."

Defendant also complains that Wilkes identified him without his having been placed in a lineup. In People v. Snell, 74 Ill. App. 2d 12, the court held that while it is preferable to have a witness identify a party from a group of unknown persons, failure to follow this practice goes only to the weight of the evidence, and is not necessary. The court said at page 22:

> "Where, as here, the witness was present during the commission of the crime, had ample opportunity to observe his assailant, and was called upon to make the identification after a lapse of less than an hour from the time of the occurrence, his testimony, if otherwise credible, can be sufficient for conviction notwithstanding failure to employ an ideal identification procedure."

In People v. Byrd, 21 Ill. 2d 114, the court said at 117:

> "Defendant also contends that at the lineup the police officers pointed out and identified defendant before the witnesses had identified him. The evidence is conflicting on this point. However, this circumstance, even if proved, would go only to the weight and credibility of the witnesses' testimony."

The defendant cites People v. Botulinski, 383 Ill. 608, in which the rule is set out that the proper way to have a witness identify, without suggestion from any officers or any interested persons, is to pick out the guilty party from a number of persons unknown to the witness. However, on page 615 the court said:

> "We have held that where one accused of a crime is brought alone before the witness for the purpose of identification, such identification is not entitled to the same weight and credibility as where the witness picks out the accused from a number of persons brought before the witness. [Citing People v. Sanders, 357 Ill. 610.]"

In the Sanders case the court held that where the witness is told in advance of the identification that the guilty party is in the custody of the police and the prisoner is produced alone for the purpose of identification, the weight

of the evidence of identification is impaired. And it has been held that a positive identification by one credible witness is sufficient to support a conviction. People v. Saravia, 64 Ill. App. 2d 479; People v. Soldat, 32 Ill.2d 478.

In the instant case, during the struggle, Wilkes had full opportunity to observe the defendant, and he testified that his recognition of the defendant was aided by the fact that he had seen him a couple of times before in the neighborhood. He identified the defendant at the police station shortly after the robbery, and again in court. His identification was sufficient, and the trial court properly accepted it.

Wilkes also testified that when the police talked to him in the squad car he told them the assailant had bushy black hair; that he was a little taller than Wilkes, who was 5'9"; and that he was a very young man. [The police officer testified that in his opinion the defendant was 19 or 20 years old.] He did not mention the matter of the man's weight. The defendant complains that the prosecutor said to the jury that Wilkes had stated that he thought the defendant was probably Mexican or Indian. No such statement was made by Wilkes, but this inadvertent remark on the part of the State, while improper, was not reversible error.

The defendant also argues that the foregoing argument of the prosecutor was improper, as well as his statement about a shirt found by the police in the alley near the place of arrest. The defendant was said to have walked out of an alley a few feet from where the incident took place, and that the shirt matching the description given by Wilkes was found in the alley. It is true that Wilkes gave no description of

the shirt worn by defendant, and the police officers testified that the defendant was wearing a white shirt at the time of his arrest. The argument was not prejudicial.

The prosecutor also stated that Wilkes had testified he saw the defendant "take off across Damen Avenue, across the street"; Wilkes did not testify to such a fact. What he did say was that at the time the police officers first came to question him, the defendant had already fled; "they were across the street, yes." At the time of the assault the truck was parked on Homer, approximately 4 or 5 feet west of Damen. Officer Hoffman testified that after the conversation with Wilkes, he and his partner went looking for two men, and they went into the alley south of Homer Street, which was eastbound from Damen, about 100 feet from the intersection. The statement of the prosecutor concerning the testimony of the police officers was not improper. Furthermore, no objection was made to the argument at the trial. In People v. Conrad, 81 Ill. App. 2d 34, 49, the court said:

> "Defendant attempts to raise on appeal for the first time the alleged prejudicial nature of other statements made by the prosecutor. However, since no objection was made at trial the issue is waived."

And the court in People v. Gaston, 85 Ill. App.2d 403, said:

> "Where the defendant's attorney does not object to the argument deemed improper,the court will not reverse unless it appears that he was deprived of his right to a fair trial."

It has been held that statements based on the evidence or on legitimate inferences deducible therefrom do not transcend the bounds of legitimate argument. People v. Woods, 26 Ill. 2d 557; People v. Allen, 73 Ill. App. 2d 256.

The arguments made by the prosecutor in the instant case did not have the effect of depriving the defendant of a fair trial, and therefore should not be considered by this court.

Defendant also argues that he was deprived of a fair trial because of improper remarks by the court. As we have pointed out earlier in the opinion, the court ordered the defendant excluded from the courtroom in accord with the rule laid down in People v. DeSimone, 9 Ill. 2d 522, in which case the defendant refused to enter the courtroom at various stages of the proceeding, and thus voluntarily absented himself from the trial. On other occasions he caused disorder in the court by profane outbursts directed at witnesses in the court. After one such outburst the court caused the defendant to be removed from the courtroom. The Supreme Court held that the provision of Section 9 of Article II of the Illinois Constitution [which ordains that an accused shall have the right to appear and defend in person] may be waived; and the court further held that the defendant did waive his right.

In the instant case, after the defendant was removed from the courtroom the following colloquy occurred between the court and defense counsel [Van Zeyl]:

The Court: Mr. Van Zeyl, did you have any conversations with him about being present during the trial?

Van Zeyl: Yes, I did.

The Court: What did he say?

Van Zeyl: Yesterday afternoon at the County Jail he indicated to me by inference--not positively, but just asked me the question as to what would happen if he did something in the courtroom. I made the remark to him, not to play games with me, I am his lawyer. I told him that if he so chooses he would voluntarily absent himself from the courtroom. He wanted to know what that meant and I explained, I told him that he had a right to waive his presence during the trial.

The Court: And he has chosen not to be present.

Van Zeyl: I also spoke to him back in the lockup in back of the courtroom.

The Court: Today?

Van Zeyl: Yes. I went back there at two o'clock before the jury was summoned into the courtroom and I asked him what he wanted to do here today. He told me "leave me alone." I asked him, "Well, I'm your lawyer, I have to know what I am doing when he stepped out before your Honor."

He said, "leave me alone," and he grabbed me by the tie and tried to pull me through the bars.

At this point I saw no further use in conducting any kind of a discussion with him, so that's all I know at this time.

During the trial defense counsel made the following statement to the jury:

> Confine your deliberations solely to what you heard from the stand, irrespective of what mental problem the defendant may have now or may have had yesterday or—

At this point the Assistant State's Attorney objected, saying there was no showing of any mental problem, and the objection was sustained. Defense counsel said, "Well, judge, I think that's obvious." The court said: "Now, I said sustained, Mr. Van Zeyl." Mr. Van Zeyl said, "All right." The court said, "I don't think there is."

On September 8, 1966, the defendant had a fair trial and was proved guilty beyond a reasonable doubt. The Criminal Code of 1961 [Ill. Rev. Stat. 1963, ch. 38, § 1-7(m)] is as follows:

> When a person shall have been convicted of 2 or more offenses which did not result from the same conduct, either before or after sentence has been pronounced upon him for either, the court in its discretion may order that the term of imprisonment upon any one of the convictions may commence at the expiration of the term of imprisonment upon any other of the offenses.

The Committee which prepared the draft of the Code adopted by the legislature has said in its comments:

> Subsection (m) is intended to codify the holding in People v. Schlenger, 13 Ill. 2d 63, 147 N.E. 2d 316 (1958), by the implicit converse of the provision stated, i.e., if the offenses resulted from the same conduct the defendant may not be sentenced on both, either concurrently or consecutively. "Conduct" is defined in section 2-4 and is used in the sense of "the same transaction" discussed in Schlenger, supra.

See People v. Schlenger, 13 Ill. 2d 63; People v. Duszkewycz, 27 Ill. 2d 257; People v. Ritchie, 66 Ill. App. 2d 302; and People v. Ritchie, 36 Ill. 2d 392. In People v. Peery, 81 Ill. App. 2d 372, it was held that even where the question of the improper sentences is not raised [as it was not in the case before us] in the reviewing court, the reviewing court must take notice of it.

Under the authority of the statute and the above cited cases, concurrent sentences for crimes resulting from the same conduct are improper, and the conviction of the lesser crime must be reversed. Therefore, the conviction on the robbery charge is affirmed, and the conviction for aggravated battery is reversed.

AFFIRMED IN PART,
REVERSED IN PART.

LYONS, P.J., and BURKE, J., concur.

(A)

105 I A 2d 261-1

NO. 66-121

FILED

JAN 30 1969

Walter T. Simmons
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS
Fifth

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

MELVIN A. HILDEBRAND, Plaintiff-Appellee, vs. CATHERINE E. HILDEBRAND, Defendant-Appellant.	Appeal from the Circuit Court of Madison County. Honorable James O. Monroe, Jr., Judge Presiding.

Goldenhersh, P. J.

Defendant, Catherine E. Hildebrand, appeals from the decree of the Circuit Court of Madison County granting plaintiff a divorce on the grounds of desertion. We reversed the decree (87 Ill. App. 2d 218) because of the trial court's denial of a petition for a change of venue. The Supreme Court allowed plaintiff's petition for leave to appeal, reversed the judgment of this court (41 Ill. 2d 87) and remanded the cause "for a consideration of the other questions presented in the appeal that have not been passed upon" by this court.

Defendant contends the trial court erred in granting plaintiff a divorce on the grounds of constructive desertion. An examination of the record shows that there is sufficient testimony to support the court's finding that plaintiff offered to provide a dwelling for defendant, their child and himself away from her mother's home and she, without justification, refused to move to such dwelling. The husband's domicile becomes that of the wife, and her refusal, without justification, to move to his domicile, is desertion on her part. Karman v. Karman, 24 Ill. App. 2d 123.

Defendant contends the court erred in granting plaintiff visitation rights with the minor child of the parties. Review of a decree fixing rights of visitation should be governed by the same rule as is applicable to review of an order fixing custody. The governing rule is thus stated in Miezio v. Miezio, 6 Ill. 2d 469, at page 472, "In awarding custody of minor children to one parent or the other, the paramount consideration must necessarily be the welfare and best interest of the children. (Nye v. Nye, 411 Ill. 408; Buehler v. Buehler, 373 Ill. 626.) Although the discretion of the trial court in matters relating to the custody and support of minor children is a judicial one and subject to review, (Nye v. Nye, 411 Ill. 408) the determination should not be disturbed upon appeal unless manifest injustice has been done."

The decree awards plaintiff rights of visitation on Sunday afternoons from 2:00 P. M. to 8:00 P. M., and we do not find that manifest injustice has been done.

Defendant argues that the trial court erred in admitting testimony of plaintiff's habits of industry and sobriety. The testimony was not material to the desertion issue but was relevant to the question of visitation. The court did not err in admitting the testimony.

For the reasons stated herein, the decree of the Circuit Court of Madison County is affirmed.

Decree Affirmed.

Concur: Caswell J. Crebs

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

No. 52405

105 I.A.2 316

HARRISON C. BAKER, JR., Plaintiff-Appellant, vs. STATE OF ILLINOIS DEPARTMENT OF LABOR, DIVISION OF UNEMPLOYMENT COMPENSATION, JOHN E. CULLERTON, Director of Labor, SAMUEL C. BERNSTEIN, Employment Security Administrator and J. R. COHEN, Unemployment Compensation Commissioners, Defendants-Appellees.	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE EDWARD F. HEALY, PRESIDING.

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT:

Plaintiff appeals from an order striking the complaint for certiorari and dismissing the action on motion of the defendants.

The points urged by the plaintiff are that he was erroneously denied the opportunity to have his entire record reviewed by the court on Writ of Certiorari and that he was denied the opportunity to amend his complaint.

The complaint alleged that the plaintiff was employed by the Department of Labor of the State of Illinois on May 1, 1958 as Unemployment Claims Examiner No. II, and that on February 1, 1959 he was promoted and appointed Unemployment Claims Deputy No. I. Numerous examinations for Unemployment Claims Deputy No. II were taken by the plaintiff and he passed all of them in the upper bracket with higher grades than those given others who were promoted to Unemployment Claims Deputy No. II. The complaint further alleged that plaintiff had wide experience as Unemployment Claims Deputy No. II, since he had successfully handled a variety of assignments in that position.

After attempting many times to determine the reason why he was not being promoted, he was told by a supervisor that he was given a poor rating by him because a previous supervisor had given him a poor rating. On February 25, 1964, just one month after the most recent appointments to Unemployment Claims Deputy No. II, plaintiff filed his complaint for certiorari and defendants filed a motion to strike the complaint and dismiss the suit on March 12, 1964. The defendants' motion to strike the complaint and to dismiss the suit was sustained and the final order of dismissal was entered on May 2, 1967. The record does not disclose the reason for the delay in the hearing of the motion from 1964 to 1967. From an examination of the record and briefs filed herein, we conclude that the court erred in denying the plaintiff leave to amend his complaint and therefore it shall not be necessary to discuss the plaintiff's first point.

Section 46 of the Civil Practice Act (Illinois Revised Statutes 1965, Ch. 110, Sec. 46(1)) permits amendments at any time before final judgments. As was pointed out in Davis v. Hoeffken Bros., Inc., 60 Ill. App. 2d 139, such amendments may change or add causes of action or defenses which may enable a plaintiff to sustain his claim or the defendant to make a defense and assert a cross demand. On page 144 of Davis, supra. the court said:

> "Subsequent to the dismissal and before the order became final, having moved for leave to file an amended complaint, plaintiff should have been given leave so to do. The provisions of the Practice Act above cited are intended to enable a litigant to present a cause of action or defense, and amendments to that end should be permitted unless it is clear that the defect in his pleading is not curable by amendment."

In Scardina v. Colletti, 63 Ill. App. 2d 481, 491 the

court said:

> "Section 4 of the Act (Civil Practice Act) states that it shall be liberally construed so that controversies may be determined according to the substantive rights of the parties. The power to allow amendments should be freely exercised so that a party may fully present his cause of action. Irwin v. Omar Bakeries, Inc., 48 Ill. App. 2d 297, 198 NE 2d 700; Davidson v. Olivia, 18 Ill. App. 2d 149, 151 NE 2d 345."

In support of the motion to dismiss the defendants argue that certain rules adopted by the Department of Personnel provided for grievance procedure which was not pursued by the plaintiff. Authority for these rules is found in Section 63b 110 of Chapter 127 of the Illinois Revised Statutes 1965. The complaint does not show that the grievance procedure was followed by the plaintiff. However, the plaintiff was denied leave to file an amended complaint in which he might have been able to correct this alleged defect and the primary question before this court is whether the trial court properly denied plaintiff's request to file an amended complaint. The defendants also contend that the plaintiff was guilty of laches because more than six months had elapsed from the time the cause of action accrued until the filing of suit. It is impossible for us to determine from a review of the record when the cause of action accrued, and therefore we are unable to determine whether the plaintiff was guilty of laches. The defendants also raise the point that if the plaintiff had a cause for complaint, it should have been addressed to the Department of Personnel of the State of Illinois. Here again the plaintiff could upon amending his complaint have brought in any necessary parties who had been omitted in the original complaint.

At the conclusion of the hearing on the motion to strike the complaint and dismiss the action, the following colloquy took place:

"The Court: Draw an order to strike and dismiss...

Mr. Lawrence: Can I have an opportunity to amend the complaint?

Mr. Genis: It's too late. We have already argued.

The Court: I have disposed of the case that has been pending now since 1964, and I think it should be dismissed.

You have your record for the Appeal Division. Let them look at it now and see what they think.

Mr. Lawrence: Except I think I ought to be entitled to one amendment, the privilege of correcting it, since Counsel for the State is insisting...

***

Mr. Lawrence: Your Honor can give me the right to amend that complaint.

The Court: Well, you got your record made... There's only one issue for them to decide... Whether I'm wrong in dismissing your complaint..."

The defendants also contend that it was not error to refuse the plaintiff's request to file one amended complaint. Among other cases, the defendants cite Deasey v. City of Chicago, 412 Ill. 151 wherein it was held that it was not prejudicial error to refuse an amendment unless there had been a manifest abuse of discretion. The defendants also cite Jilek v. Missouri Pac. R. Co., 13 Ill. App. 2d 518 wherein the court held that a judgment would not be reversed for refusal to allow an amendment unless there had been an abuse of discretion.

[1] The defendants also argue that the defendants were not proper parties defendants and that of itself was sufficient reason to dismiss the suit. If that contention were true the plaintiff, by filing an amended complaint, could have had heretofore shown or joined additional and proper parties to correct the alleged defect. We conclude that under existing statutes the trial court abused its discretion

in denying the plaintiff leave to file one amended complaint, which request was made twice before the entry of the final order.

Judgment is reversed and the cause is remanded with instructions to the trial court to grant plaintiff leave to file an amended complaint herein.

REVERSED AND REMANDED WITH DIRECTIONS.

SCHWARTZ and DEMPSEY, JJ., Concur.

105 I.A. 2317

No. 52114

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THOMAS G. McCANN,

Plaintiff-Appellee,

vs.

CIVIL SERVICE BOARD OF THE METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, and CHESTER KOPEC, Director of Personnel of the METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO,

Defendants-Appellants.

Appeal from the Circuit Court of Cook County, Illinois.

Honorable Charles S. Dougherty, Presiding.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

The plaintiff, Thomas G. McCann, brought suit in the Circuit Court pursuant to the Administrative Review Act, Chapter 110, Section 275, Illinois Revised Statutes. The Circuit Court reversed the decision of the defendant, Civil Service Board, and the defendants prosecute this appeal.

The defendants contend that the plaintiff was not eligible for certification or appointment; that any rights that the plaintiff had as to certification are lost because the eligible list expired by law; and that the judgment of the lower Court was erroneous because under the statutory "Rule of 3" the defendant cannot be compelled to certify or to appoint only one applicant.

Prior to May 5, 1964, the defendant, Director of Personnel of The Metropolitan Sanitary District of Greater Chicago, announced an open examination for the classification of Civil Engineer IV. As to the qualification for taking the examination, the announcement stated as follows:

> "Qualification: Nine years progressive experience in civil engineering design, construction or hydraulics, especially as applied to sewage treatment system and facilities and related areas such as waterways control. Graduation from a four year accredited college in Civil Engineering course. Full time graduate study in pertinent fields may be substituted for experience on the basis of one school year of study for one and one half years of experience. Must be registered as Professional Engineer in the State of Illinois. Equivalent combination of training and experience will be considered."

The plaintiff was an employee under the classified Civil Service of the District as a Civil Engineer III. It is noted that the plaintiff did not have a license as a Professional Engineer in the State of Illinois. He applied to take the examination, but his application was refused on the grounds that he did not have a Professional Engineer's license. Upon notification of his refusal, the plaintiff protested, and the registering official for the examination examined plaintiff's personnel jacket for training and experience, and accepted his application. On May 15, 1964, the plaintiff took the examination. The eligible list was finally posted on June 18, 1964 containing the name of the plaintiff as number 10. In a letter to the plaintiff by the Director of Personnel on June 19, 1964, the Personnel Director advised the plaintiff that the examination for the classification of Civil Engineer IV had been completed and that:

> "Your relative standing among the candidates was number 10. Under the provisions of the statute governing The Metropolitan Sanitary District of Greater Chicago, the eligible register shall be in force only until permanent appointment has been made from the list."

This letter was signed by the Director of Personnel of the District. The eligible list is the list from which the candidates are certified for appointment to any vacancy.

On July 8, 1964, nine eligibles were certified and appointed from the eligible list to the position of Civil Engineer IV. Those certified were Nos. 1, 2, 3, 4, 5, 7, 11, 14 and 15. The plaintiff's name was not certified by the Director. On July 16, 1964, the plaintiff petitioned the Civil Service Board of the District that although he had successfully passed the examination and had been placed on the eligible list, he had not been certified or appointed. The plaintiff met with the Board on August 21, 1964 and was advised on August 27, 1964 by the chairman of the Civil Service Board that the matter had been referred to a consultant who was conducting an investigation into examination procedures in the District. The plaintiff met with the consultant on September 2, 1964. The plaintiff, on September 10, 1965, not having heard as to the disposition of his petition made further inquiry. The matter came up before the Civil Service Board on September 24, 1965 and was continued for further information.

On October 29, 1965, the matter was discussed by the Board and plaintiff's petition was dismissed. The decision of the Board was based, among other things, upon the report of the consultant who found that the plaintiff did not have the qualifications required, and the Board ruled that pursuant to Civil Service Personnel Rule 7.05, the Director should remove the plaintiff's name from the eligible list. At the hearing on October 29, 1965, the Board ruled further that the eligible list had expired by operation of law.

The plaintiff then filed suit on November 17, 1965, praying that he be certified and appointed as Civil Engineer IV. The Circuit Court Order is set forth as follows:

> "x x x 1. That, after making the necessary application therefor, the Plaintiff, THOMAS G. McCANN, took the Civil Service examination held on May 15, 1964 for the position of Civil Engineer IV, in the classified service of the Metropolitan Sanitary District of Greater Chicago (hereinafter called 'District').
>
> 2. That said Plaintiff successfully passed said examination and on to-wit, June 18, 1964 x x xDirector of Personnel x x x posted the revised eligible list of successful candidates in said examination, and the Plaintiff's name appeared thereon as No. 10 on said list, with a final average of 98.19, after adjustment for the granting of military credits; that thirty-four names appeared on said eligible list.
>
> 3. That, thereafter, on, to-wit, July 8, 1964, nine eligibles on the aforesaid list were certified and appointed to vacancies existing in the position of Civil Engineer IV in the District; that the person so certified and appointed had the following standings on the aforesaid eligible register: Nos. 1, 2, 3, 4, 5, 7, 11, 14 and 15.
>
> 4. That the Plaintiff, being No. 10 on said eligible list, was entitled to certification for appointment to the eighth vacancy then existing in said position of Civil Engineer IV, and, in the event he was not appointed from the certification required to be made for vacancy No. 8, was entitled to have his name included in all subsequent certifications until appointed.
>
> 5. That on, to-wit, July 8, 1964, and at all times from the posting of the aforesaid eligible list until, to-wit, October 29, 1965, the Plaintiff's name appeared on the aforesaid eligible register as successful candidate No. 10; that Plaintiff's name was not stricken from said list until, to-wit, October 29, 1965, when all names remaining on said eligible register were stricken by action of the Director of Personnel of the District.
>
> 6. That the Plaintiff, having been allowed to compete in the aforesaid examination on the basis of qualifying through 'equivalent combination of training and experience', was entitled to have his name certified, as aforesaid, for appointment to the position of Civil Engineer IV in the District, pursuant to the provisions of Illinois Revised Statutes 1965, Chapter 42, Section 323.11, and the failure of the Defendant, DIRECTOR

OF PERSONNEL, to certify Plaintiff's name, deprived Plaintiff of his civil service rights in the premises.

7. That the Plaintiff, having made apt complaint to the Director of Personnel, and said complaint not having been finally determined by the Defendant, DIRECTOR OF PERSONNEL, and the Defendant, CIVIL SERVICE BOARD, until, to-wit, October 29, 1965, the cancellation of the aforesaid eligible register on, to-wit, October 29, 1965, did not destroy Plaintiff's rights in the premises or his right to be certified for appointment to the position of Civil Engineer IV in the District.

IT IS, THEREFORE, ORDERED that the decision of the Defendant, CIVIL SERVICE BOARD, and the Defendant, DIRECTOR OF PERSONNEL, of October 29, 1965, as set forth in the letter from the Defendant, DIRECTOR OF PERSONNEL, to the Plaintiff under date of November 3, 1965, referred to in Paragraph XI of Plaintiff's Complaint, may be, and the same is hereby reversed and set aside.

IT IS, FURTHER, ORDERED that the Plaintiff have and recover from the Defendants herein as cost by him expended in the sum of TWENTY-EIGHT DOLLARS ($28.00)."

We deal first with the contention of the defendants that at no time was the Plaintiff eligible for certification or appointment because he did not possess the necessary qualification required in the announcement, to-wit, a license as a Professional Engineer in the State of Illinois. The last two sentences as to qualification for the exam were:

"Must be registered as a Professional Engineer in the State of Illinois. Equivalent combination of training and experience will be considered."

The defendant argues that the words "must have a license" is mandatory to take the exam and that the last sentence of "equivalent combination of training and experience will be considered" applies only to the first three sentences of the paragraph of qualifications, which deal with experience and training. With this we cannot agree. By ordinary rule of construction, the last sentence would modify what immediately precedes it, and, in

particular, we rule that the last sentence modifies the preceding sentence. To sustain this conclusion, we need only examine the facts. When the plaintiff first submitted an application to take the examination, it was denied. Upon review of his training and experience he was allowed to take the examination. The conclusion can be drawn that training and experience are an equivalent to licensing.

However, the defendant argues that the General Superintendent announced the policy on April 29, 1964, that any candidate who met the qualifications otherwise, but lacked a license would be permitted to compete in the examination, but would not be certified or appointed until he had obtained a license; and this was a governing factor in allowing the plaintiff to take the exam and therefore, did not render him eligible. However, Chapter 42, Section 323.7, Illinois Revised Statutes, provides that:

> "The Director shall control all examinations."

And it is further stated in Section 323.9 of Chapter 42 that:

> " x x x the Director shall prepare a register x x x of the persons who shall attain such minimum mark as may be fixed by the Director for any part of such examination, and whose general average standing upon examination for such grade or class is not less than the minimum fixed by the rules of the Director, and who are otherwise eligible; x x x." (emphasis supplied.)

By statute then, the Director controls who is eligible, and who is not for examination, and not any policy of the General Superintendent.

Pursuant to Section 323.9, supra, the Director prepared a list, but thereafter omitted the plaintiff for certification to a vacancy.

We, therefore, have a situation where a qualification was added to the certification which did not appear on the stated qualifications to take the exam for the eligible list. What results when the eligible list is so altered? In People ex rel. Gaynor v. Board

of Fire Com., 14 Ill. App. 2d 329 (1957), the Board after posting the eligible list, altered a method of marking for seniority and the Court in dealing with the change said, on Page 335:

> "When the Board made up its first register or eligible list pursuant to the above law, that list had legal significance. It was the list from which the Board was required to submit names to fill vacancies. The statute x x x provides for the submission of three persons highest on the list for each position, and as there were two vacancies, the Board was required to submit four names to the head of the department, from which he would select two men to fill the two positions. If, therefore, the examination as originally held was valid, the only remaining duty of the Board was ministerial, clear, and enforceable by mandamus x x x .
>
> The only question is whether there was an error which the Board could correct. x x x
>
> In the instant case is was not a mistake of fact nor a misinterpretation of its rules which the Board attempted to correct by its resolution of January 7, 1956. It was a change of mind with respect to the weight to be given to seniority. x x x "

The defendants contend that there was authority to remove a person from the list if he was placed on it in error pursuant to Personnel Rule 7.05 of the Classified Service of the District for correction of lists. As we have held that the plaintiff was eligible to take the exam, the correction of the list or a change in the qualifications as to certification would not be a correction as to fall under said personnel rule. The cases relied upon by the defendants, as authority that the Director has the power to remove names from the eligible list once placed, are clearly distinguishable upon their facts in that the persons on the list in the cases cited were not eligible to take the examination.

The defendants also contend that the plaintiff does not have any right to certification at the present time since the eligible list expired by operation of law. We hold that as the plaintiff made apt complaint to the Director of Personnel and his complaint

not having been determined by the defendants until cancellation of the eligible roster, the cancellation of the roster did not destroy the plaintiff's rights to be certified for appointment to the position of Civil Engineer IV in the District. To hold otherwise would be tantamount to allowing the Civil Service Commission to set a time limit of such short duration upon any eligibility list, that when it finally adjudicates the matter, the applicant will be barred. This destroys the tenet of our judicial system that for every wrong there is a remedy if timely complaint is made.

The last contention of the defendants is that the judgment was erroneous because under the statutory rule the Director cannot be compelled to certify only one applicant. However, we note, that the authority cited by the defendant, People ex rel. Lynch v. City of Chicago, 271 Ill. App. 360, 371 (1933) was a case decided before the adoption of the Administrative Review Act. In the Lynch case, supra, the action was by way of mandamus. To hold that after the plaintiff's rights were denied, he cannot be certified because of a Rule of 3, is to deny the plaintiff judicial review.

We note, that under the Rule of 3 as enunciated by the defendants for nine vacancies, the defendants themselves did not comply with the Rule of 3. There were nine vacancies, yet only nine eligibles were certified from the list. If the Director followed the Rule of 3, eleven would have been certified. The defendants may not raise an objection based upon a statute which they themselves have violated, under the circumstances found here. [1.] We hold that the Administrative Review Act is the proper method of proceeding in the case at bar and that the trial court was correct in reversing the decision of the Civil Service Commission.

Based upon the aforesaid, the judgment of the trial court is affirmed.

Judgment Affirmed.

DAVIS, J. and ABRAHAMSON, J. concur.

52045

105 I.A.2 345

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.
	)	
vs.	)	
	)	
ISAAC GREEN,	)	Hon. George N. Leighton, Presiding.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

In a trial by the court without a jury, the defendant, Isaac Green, was found guilty of the murder of his sister-in-law, by shooting. After his motions for a new trial and in arrest of judgment were denied, judgment was entered and the defendant was sentenced to not less than thirty nor more than forty years in the Illinois State Penitentiary. In this appeal, the defendant contends that his alleged voluntary intoxication vitiated the voluntariness of his oral and written admissions and confessions and negated the criminal intent required as an essential element of murder. The facts follow.

In his written, pre-trial motion to suppress oral and written admissions and confessions due to their alleged involuntariness, the defendant specified four grounds for relief: (1) alleged physical beatings by the police; (2) refusal of the police to permit the accused to telephone his family and his attorney; (3) failure of the prosecutor to advise him of his right to remain silent; (4) alleged deception by the police and prosecutor at the time of his in-custody interrogation in that the written confession purportedly signed by the defendant within five hours after his arrest was not the confession he had, in fact, signed. At the hearing on this pre-trial motion, the State produced as witnesses the two arresting officers; the two detectives who interrogated the defendant immediately after his arrest; the assistant state's attorney who conducted the oral examination of the defendant in

question and answer form within hours after the arrest; and the court reporter who took down the questions and the defendant's answers thereto and later transcribed them into a typed statement which was signed by the defendant and two witnesses, i.e., one of the detectives and the assistant state's attorney.

At this hearing, the police officers and detectives denied any police mistreatment and denied that the defendant was kept from making any telephone calls. Detective Deneen testified that he gave the accused a telephone at the defendant's request and the defendant called both his brother and his wife from the police station before giving any statements. Officer Bronaugh testified that he arrested the defendant approximately one block from the homicide scene as the accused fled. At the time of his arrest, the accused asked the two arresting officers: "Is she dead? If she is, I am satisfied." Moreover, at the police station, the defendant said: "I don't need a lawyer; I am guilty and I am willing to accept my punishment." Bronaugh also stated that the accused had been drinking. There was a noticeable odor of alcohol on the defendant's breath. The other arresting officer, Officer Ellis, corroborated Bronaugh's testimony, except he stated that the defendant did not have the odor of alcohol about his person or breath, but he had been drinking as evidenced by his manner of speech.

Detective Deneen testified that he was present with the assistant state's attorney and the court reporter when the defendant, in the police station, made a statement in narrative form in response to the questions posed to him by the assistant state's attorney. This was done within approximately 3-1/2 hours after his arrest. Continuing, Deneen stated that he was with the accused from about one hour after his arrest to the time the defendant signed his written confession. During this time, Deneen asked the

accused if he had been drinking. The defendant replied that he and the deceased had split a half pint of Scotch about an hour before the homicide. In Deneen's opinion, the defendant was very "sharp" for a fifty-five year old man and had full control of all his faculties. Before asking any questions of the defendant, it was Deneen's testimony, that the assistant state's attorney advised the defendant of his right to remain silent, to which the accused replied, in Deneen's presence: "I'll say what happened." After his statement had been transcribed and reduced to writing, the defendant voluntarily read it aloud, using his broken eyeglasses, but looking through its one good lens. As a result of his reading, the defendant made two corrections in the confession, ultimately signed it, and initialled each of its pages. Deneen signed the written confession as a witness and initialled each of its pages also.

Detective Murphy, Deneen's partner, corroborated much of Deneen's testimony regarding the absence of any police mistreatment and the fact that the defendant did call both his brother and his wife before giving any written statements. Murphy stated that he could tell that accused had a few drinks because he showed no remorse at all and was very cooperative. Later, Murphy stated that the defendant acted as a sober man. He did not see the defendant sign his written statement.

The assistant state's attorney, Gino DiVito, who conducted the examination of the defendant culminating in his written confession, testified that he met the defendant in a police station approximately 3-1/2 hours after the arrest. Before taking the accused's statement, DiVito stated that he advised the defendant of his privilege against self-incrimination. The defendant consented to giving a statement which was then taken in the presence of Deneen, DiVito, and Esling, the court reporter. After the

defendant's statement had been reduced to writing, it was handed to the accused who put on his eyeglasses, looked through its one good lens, and read back the typed confession to both Deneen and DiVito. The defendant thereupon made two corrections in the typed confession changing the sex of his youngest child from female to male and making it clear that he carried a .22 caliber revolver in his pocket at all times and not both .22 and .38 caliber revolvers. The accused printed the word "Ike" immediately below each of these two handwritten corrections, signed it on the last page, and initialled each of the other pages. DiVito signed the confession as a witness and initialled each of the pages. DiVito also testified that he asked the defendant if he had been allowed to use the telephone, and the accused said he had made two calls.

Paul Esling testified that he was the court reporter who took down the defendant's answers to the questions posed to him by the assistant state's attorney and who later transcribed and typed the questions and answers into the form of a written confession. This witness also stated that he took a photograph of the defendant immediately after the accused had given his statement to DiVito.

In support of his motion to suppress, the defendant testified that one of the arresting officers, Officer Ellis, allegedly struck and kicked him on two occasions. The accused denied asking the arresting officers if the deceased was dead and if she were, he was satisfied. The accused also stated that he remembered someone telling him that he was an assistant state's attorney, but the defendant could not identify him either then or now because defendant's glasses were broken and he could not see without them. He also did not remember seeing Esling, the court reporter. The defendant stated that on the date of his arrest he had been drinking Scotch since 8:00 P.M. and had last drunk some at approximately

1:45 A.M., approximately two hours before his arrest. The defendant also testified that he was not "feeling" his drinks because he drank a good quantity of ice water with them.

Regarding his written confession, the defendant stated that he did not remember anyone asking him questions and his giving any answers. He said this absence of memory was due to alleged police misconduct, as one of the arresting officers had allegedly struck him on the side of the head and knocked him down. Later in his testimony, the accused stated that he could not read the written confession because his glasses were broken so the assistant state's attorney read it to him. The defendant then signed the confession and initialled each of its pages at the direction of the state's attorney. He did not read it, but it was the defendant's testimony that the written confession which was read to him in the police station and the written confession that the State was now seeking to introduce against him were two different documents. The accused admitted that he printed "Ike" on two separate pages of the confession but did so only at the alleged direction of the assistant state's attorney.

On cross-examination, the defendant admitted that he still only had one lens in his glasses, but this enabled him to see and read fairly well. He did not remember a photograph being taken of him in the police station shortly after his statement had been taken. At the conclusion of the defendant's testimony, his motion to suppress was denied.

At the trial of the case-in-chief, the State presented two witnesses: the decedent's sister, Mrs. Juliette Green, who was also the wife of the defendant, and one of the arresting officers, Officer Bronaugh. Mrs. Green stated that she saw the decedent, Annie L. Williams, two days before the homicide and she was alive. When this witness saw her again in the morgue on

March 8, 1965, her sister was dead.

Officer Bronaugh testified that on March 7, 1965, at about 3:40 or 3:45 A.M., he and his partner, Officer Ellis, were cruising in their marked patrol car in the vicinity of 60th and South State Street. He saw the defendant and a woman facing each other. The woman had a purse on one arm and two orders of barbecue in the other. The defendant was talking and gesturing with his hands and arms. As the officers continued on their patrol, Bronaugh heard a woman's voice shout for the police and this was followed by one shot. As the car was shifted into reverse, backed up and eventually came to a halt, Bronaugh heard five more rapid shots and the defendant was standing over the prone woman. The accused then fled, but was arrested within one block of the homicide scene. As Bronaugh pursued the defendant, he saw that the accused had a .38 revolver in his hand. This weapon was later seized when the defendant was arrested. It had six spent cartridges in its cylinder. In addition, a loaded .22 caliber revolver and a box of cartridges were found on the defendant's person when the police conducted a search incidental to the defendant's arrest. Bronaugh repeated his earlier testimony that upon his arrest, the defendant orally indicated that he was satisfied that the woman was dead and in the police station, this witness heard the accused say: "I'm guilty and I'm willing to accept my punishment. I should have killed her a long time ago. I wouldn't have shot her if she hadn't got smart and yelled for the police."

The defendant testified that on the night of the homicide he had been drinking Scotch and water and beer from 8:00 P.M. until shortly before the homicide. He could not remember how much Scotch he had drunk, but he did have ten to fifteen beers. He had known the decedent since 1957 and accidentally met her on March 7, 1965, at about 3:30 A.M. in a barbecue stand located at

59th and State Street. The defendant was alone and was leaving when the deceased entered. Shortly thereafter, the decedent approached the defendant on the street and began arguing with him alleging that he had caused her eviction from an apartment. The defendant stated that at this time he did not see the decedent holding a purse, but she might have had an order of barbecue in her hands. Continuing, the accused testified that the deceased cursed him and said she was going to kill him. At this time, the defendant noticed that she was holding a .22 caliber revolver in her hand so the accused drew his revolver and started firing. He fired six shots after which he walked rapidly from the scene. He was arrested approximately one block away. The defendant denied that the deceased screamed for help, that she called for the police, and that he ever said he was satisfied that she was dead. The accused also denied that the .22 caliber revolver belonged to him. It was his testimony that this weapon was in the deceased's possession when he fired his six shots. Furthermore, the defendant testified that at the time of the homicide he was not sober but was "high." On cross-examination, the defendant stated that the deceased was still standing when he pulled the trigger of his gun for the seventh time but failed to get a report.

The attorneys for both sides stipulated that the cause of death was a gunshot wound to decedent's heart; that at the time of her death she was intoxicated; and that all of the evidence adduced at the hearing on the defendant's pre-trial motion to suppress regarding his alleged intoxicated state would carry over into the case-in-chief. The written confession and the photograph of the defendant were also introduced into evidence over the objection of the defendant. The confession states in relevant part:

> Q. First of all, Mr. Green, I would like to advise you you have a right to a lawyer if you want one.

A. Look, what am I going to give a lawyer? I got a record. I done it and I know I'm going to be punished. . . . I know I'm guilty.

Q. Secondly, I would like to advise you you need not say anything, anything you say can be used against you.

A. I'll say what happened. I'm not one of those fellows that's trying to get away with something.

* * *

Q. Did you go to Kelly's (i.e., tavern) then?

A. Yes, we (i.e., defendant and deceased) went down there.

Q. What did you do there?

A. We had--we drink a half pint of J.B. Scotch. We were setting the drinks up with Scotch and 7-Up.

Q. How long did you stay there?

A. Oh, I guess about an hour and a half, I imagine. We left there and came back to 58th and State to the barbecue place.

* * *

Q. Did you buy anything?

A. We bought two orders of barbecue to take out. We started walking home and the argument started.

* * *

Q. What happened then?

A. Then she started loud talking. She started hollering, police, police. . . . I know I had them rods on me and I opened up on her, that's all I have to say.

Q. You opened up on her. What did you open up on her with?

A. That.

Q. I show you this Smith and Wesson 38 caliber blue steel revolver serial number C 714202. . . and ask you if this is the gun that you shot her with?

A. That's it right there.

Q. Where was that gun before you shot her?

A. In my right hand coat pocket.

* * *

Q. Were you carrying any other weapon?

A. Yes.

Q. On that day? What were you carrying?

A. That .22.

Q. Were both guns loaded?

A. Yes.

* * *

Q. You say you let your sister-in-law have it then?

A. Yes.

Q. What exactly did you do?

A. She started screaming for the police. I pulled it out and I'm sunk with a record anyhow so rather than get caught without doing nothing, I let her have it.

Q. You pulled the .38 and fired?

A. Yes.

Q. Was she standing when you first fired?

A. Yes.

Q. How many shots did you fire?

A. As long as it was shooting. Six, I guess.

* * *

Q. What happened then?

A. The police backed up and I run around the corner. That's all I know.

* * *

Q. Have you been allowed to make any phone calls?

A. Yes, I talked to my brother and my wife. I didn't talk to my mother.

* * *

The first contention of the defendant is that the written confession should not have been admitted into evidence due to his intoxication. Initially, it should be noted that this ground for denying admission of the confession was not mentioned in the defendant's written pre-trial motion to suppress. It might be

maintained that due to this failure the defendant has waived any such argument. See Ill. Rev. Stat. (1965), ch. 38, §114-11(a) and (b). However, in light of the fact that the defendant's sobriety or lack of it was mentioned in the hearing on his pre-trial motion, we are of the opinion that no waiver has occurred in this case. Furthermore, the principles enunciated in Lynumn v. Illinois, 372 U.S. 528, 83 S.Ct. 917 (1963), might be applicable to the instant case. In Lynumn, our highest reviewing court held that if an accused's confession is found to be not voluntary, this would require reversal of his conviction regardless of the possibility that there might be other evidence sufficient in itself to support a conviction, because admission into evidence of such a confession violated due process.

Whether or not the defendant in fact proved he was intoxicated is another factor to be considered. He urges a theory of derivative intoxication saying, in effect, that because the deceased was found to be intoxicated and both he and the deceased were drinking together before the homicide, he too must have been intoxicated and hence his confession was not voluntary. Aside from the inherent implausibility of such a contention and its reliance upon speculation rather than proven facts, the law in Illinois and in other jurisdictions is that the intoxication of the accused at the time he confesses, as a general rule, does not render his confession involuntary per se, but rather affects only the weight of the confession as evidence against him. As long as the accused is capable of making a narrative of past events or of stating his own participation in the crime, his statements are admissible against him. See People v. Townsend, 11 Ill. 2d 30, 42, 141 N.E. 2d 729 (1957); cert. den. 355 U.S. 850; rehr. den. 355 U.S. 886; cert. den. 358 U.S. 887; People v. Hulet, 66 Ill. App. 2d 194, 214 N.E. 2d 299 (1965); and the annotation in 69 A.L.R.

2d 361, wherein is found this statement: "The case law on the subject under annotation may be summarized briefly: proof that the accused was intoxicated at the time he confessed his guilt of crime will not, without more, bar the reception of the confession in evidence. But if it is shown that the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements, then the confession is inadmissible." See also Ill. Rev. Stat. (1965), ch. 38, §114-11 (f) wherein it is stated: "The issue of the admissibility of the confession shall not be submitted to the jury. The circumstances surrounding the making of the confession may be submitted to the jury as bearing upon the credibility or the weight to be given to the confession."

In the instant case, the confession itself shows that the defendant was able to give a clear narrative of the events occurring before the homicide, and he also stated his own participation in the crime. In fact, the confession bears two corrections made by the accused shortly after it was reduced to writing. The defendant did contend that this confession was not the one he had signed in the police station, but the trial court, sitting as the trier of fact, chose to believe the two witnesses to the confession, Deneen and DiVito. We cannot say that such a finding by the trial court was either against the manifest weight of the evidence or a clear abuse of discretion. People v. Spencer, 27 Ill. 2d 320, 189 N.E. 2d 270 (1963); People v. Kirk, 36 Ill. 2d 292, 222 N.E. 2d 498 (1966). Thus, the written confession of the accused was properly admitted into evidence for whatever weight the trier of fact chose to give it.

The defendant briefly contends that his confession was also not voluntary because it was obtained during a period of illegal detention. Aside from the fact that illegal detention

does not of itself render a confession inadmissible but is a circumstance to be considered as to the voluntary character of the confession, People v. LaFrana, 4 Ill. 2d 261, 122 N.E. 2d 583 (1954), the defendant never mentioned this argument in either his written pre-trial motion to suppress or at the later hearing thereon. Consequently, there is nothing in the record to support it.

Finally, the defendant contends that his voluntary intoxication negated an essential element of murder--malice. Under our Criminal Code, voluntary intoxication is an affirmative defense to a crime if it negatives the existence of a mental state which is an element of the offense. Ill. Rev. Stat. (1965), ch. 38, §6-3(a); §3-2(a) & (b); People v. Evrard, 55 Ill. App. 2d 270, 204 N.E. 2d 777 (1965). Murder in our Criminal Code requires a mental state of either "intending" to kill or do great bodily harm to an individual or another or "knowing" that such acts will cause death to that individual or another or "knowing" that such acts create a strong probability of death or great bodily harm to that individual or another. Ill. Rev. Stat. (1965), ch. 38, §9-1(a). Therefore, this contention by the defendant, if supported by the record, would have merit.

In the past, it has been held in this jurisdiction that an accused would not be convicted of murder but could be convicted of manslaughter if his voluntary intoxication was so extreme as to suspend entirely his power of reason rendering him incapable of any mental action, unless the intent to kill was formed before his intoxication. People v. Cochran, 313 Ill. 508, 145 N.E. 207 (1924); People v. Tanthorey, 404 Ill. 520, 89 N.E. 2d 403 (1949); People v. Strader, 23 Ill. 2d 13, 177 N.E. 2d 126 (1961). The defendant is not acquitted in such cases due to the universally accepted general rule of law that voluntary intoxication will never

serve to excuse the commission of a crime. In fact, at common law drunkenness served to aggravate a crime rather than to mitigate it. See annotations in 12 A.L.R. 861; 79 A.L.R. 897; and 8 A.L.R. 3rd 1236.

In the case at bar, the defendant principally relied upon self-defense in the trial court. He did mention that he was "high" with liquor at the time of the homicide. The policemen called as witnesses for the prosecution did not testify that the defendant was intoxicated when he was arrested. They only said that the accused had been drinking. Furthermore, the actions of the defendant in this case are inconsistent with his contention that his voluntary intoxication negated the malice required to support a murder conviction. It will be noted that the defendant fled the scene immediately after the homicide and was arrested about a block away, thereby showing a consciousness of guilt on his part as he attempted to avoid capture by the police. Moreover, at the trial, the defendant was able to remember that he shot the deceased six times and pulled the trigger a seventh time but did not get a report. In addition, Officer Bronaugh testified that upon being arrested, the defendant stated that he was satisfied if the deceased were dead. All of these factors coupled with the cooperativeness of the defendant in the police station as evidenced by the testimony of the prosecution's witnesses and the written confession itself, show that the defendant intentionally and knowingly killed the decedent and that any voluntary intoxication, if in fact it existed, did not affect the mind of the defendant so as to negate the specific intent required to support a murder conviction. See People v. Lion, 10 Ill. 2d 208, 139 N.E. 2d 757 (1957) and People v. Shaw, 64 Ill. App. 2d 262, 211 N.E. 2d 394 (1965).

A photograph was taken of the defendant after he had given

his confession to the assistant state's attorney. It was introduced into evidence in addition to his written confession. In this appeal, the defendant also attempts to use this photograph as further support for his contention that his voluntary intoxication negated the criminal intent required for murder. He contends that the photograph shows him to be in an alleged dazed condition with a silly smile on his face. For the reasons mentioned in the preceding paragraph, we are of the opinion that the defendant intentionally and knowingly killed the decedent.

Accordingly, the judgment is affirmed.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. EDDIE B. BOYD (Impleaded), Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT COOK COUNTY HONORABLE JACQUES F. HEILINGOETTER Presiding

MR. JUSTICE MC CORMICK DELIVERED THE OPINION OF THE COURT.

Count I of the indictment against Eddie Boyd, defendant, charged him with the offense of attempt to commit robbery, and Count II with the offense of aggravated battery. The case was tried before a jury; defendant was found guilty on both counts of the indictment, and sentenced to one to five years in the penitentiary on each count, the sentences to run concurrently. In this court the defendant contends he was not proved guilty beyond a reasonable doubt, and that it is error to convict a defendant of two crimes arising out of the same transaction.

On December 31, 1966, John O'Dea, complaining witness, and Eddie Boyd, the defendant [accompanied by Leon Davis] were passengers on an elevated train. There is no question that a fight took place in the car in which the three were seated. The question to be determined by the trier of fact was the series of events leading up to the fight.

O'Dea testified that he had left his home at about 2:00 a.m., and had gone to a tavern at 75th and Exchange, where he had two beers; that after about 20 minutes he took a bus to 63rd and Stony Island and boarded the elevated train at about 4:00 a.m., on his way to visit a friend. The defendant and Davis were sitting across the aisle from O'Dea and began making remarks to him, which he ignored. The defend-

ant crossed the aisle and asked O'Dea to give him a dime. When he replied that he didn't have a dime the defendant told him he had better give it to him or he would take all his money from him. When O'Dea continued to ignore him, the defendant returned to Davis, and after a conversation, both men crossed the aisle to O'Dea, demanding all of his money and threatening to take it. When he refused, the two young men started beating the 57-year old O'Dea, call- him an indecent name and saying, "Kill the --- ---." They continued beating him, banging his head against the window until the window was shattered and he was knocked insensible. He suffered multiple lacerations about the face, several cuts on the head, dentures broken beyond repair, lacerations inside his mouth, and two black eyes.

C. T. A. Police Officer Frank Kretz testified that he and his partner, James Crossin, were at the Cermak Road "L" Station waiting for a train. As it pulled in he noticed that one of the windows was broken and that there was a fight going on in the train. He saw one man holding the complaining witness by the back of the neck and punching him while another man stood in front of the complaining witness and punched him with both hands. Officer Kretz entered one door and his partner the other; Officer Kretz saw the defendant and Davis flee into the next car. The two officers went to O'Dea who was bleeding profusely about the face; the three then went to the car ahead where O'Dea pointed out the defendant and Davis as the men who had attacked him. Officer Kretz also pointed out the defendant in court. He further testified that the defendant had damp blood on both hands and that he wore three rings on each hand.

Officer James Crossin testified that as the train was pulling into the station he and his partner, Officer Kretz, saw the

defendant and Davis beating a man whom he now knows as John O'Dea, the complaining witness. They entered the car and saw the defendant running into the next car. After checking the condition of the victim, the two officers and O'Dea went to the other car where O'Dea pointed out the defendant and Davis. Officer Crossin further testified that when he was waiting on the platform he saw the defendant standing in front of O'Dea, striking him about the face and head, and that O'Dea seemed almost unconscious at the time. He stated that he noticed fresh blood on the defendant's hands and added that the lighting oonditions in the car were very good. He and his partner then arrested the defendant.

The defendant testified in his own behalf as follows. He was a short-order cook in a restaurant, and on the night in question had worked from 8:00 p.m. to 4:00 a.m., after which he went to Cottage Grove "L" Station with Leon Davis; they were going to a party on the west side. They sat across the aisle from O'Dea who "was very intoxicated and he was down between the seat." The defendant picked him up and put him on the seat, after which O'Dea started talking to him, asking if he knew where there were any colored girls. The defendant said he would rather not listen to his conversation, and O'Dea started to "cuss" him and called him "nigger." He still refused to talk to O'Dea and O'Dea slapped him. Davis restrained the defendant from slapping O'Dea, but when O'Dea hit him again the defendant hit him back and they started fighting. He testified that he had only one ring on his right hand. The defendant further stated that he and Davis then went into the other car, after which the police officers came in and arrested them both, handcuffed them and started beating and kicking them. He stated that later, when they were taken to the police station, one of the officers put a

gun to Davis' head and said he ought to be killed. The defendant denied he had asked O'Dea for any money.

In rebuttal Officer Kretz testified that he had not kicked or beaten the defendant on the occasion of his arrest, and that he had not seen anyone put a gun to defendant's head and threaten to kill him. He stated that in his opinion O'Dea was not intoxicated on the morning in question. Officer Crisson also testified in rebuttal that no one struck or beat the defendant at any time or threatened to kill him. He also stated that it was his opinion that O'Dea was not intoxicated.

The question for the trier of fact was which witnesses were telling the truth. The jury believed the testimony of O'Dea, the complaining witness, and the officers, which they had a right to do. It has been repeatedly held--so often that it requires no citation of authority--that where the evidence is conflicting and cannot be reconciled, it is the duty of the trier of fact--whether judge or jury--to determine the credibility of the witnesses and the weight given their testimony; and a reviewing court cannot substitute its judgment for that of the jury or the trial court, nor can it disturb a verdict of guilty on the ground that the evidence is not sufficient to convict, unless it is so palpably contrary to the verdict or so unreasonable, improbable or unsatisfactory as to justify the court in entertaining a reasonable doubt of defendant's guilt. People v. Tensley, 3 Ill. 2d 615. The testimony of the State's witnesses in the instant case does not fall within that classification. The evidence was sufficient to convict the defendant beyond a reasonable doubt.

The defendant makes the further argument that since the robbery attempt and aggravated battery were a result of the same transaction it was error to convict him of both crimes.

This question has been before the Illinois courts several times. In People v. Quidd, 403 Ill. 15, the defendant was indicted for the crime of larceny by embezzlement; he was tried on two counts of the indictment, the offense charged in each relating to the same transaction. The first count charged embezzlement by a public officer, and the second charged embezzlement as agent. On trial the defendant was found guilty upon both counts, and the court sentenced him to the penitentiary for the same term on each count. The court held that there was no error in the trial court's sentencing defendant on each of two counts relating to the same transaction, and said at page 20:

> "Where there are two counts in an indictment growing out of the same transaction, the effect of two verdicts is the same as a finding that the defendant is guilty as charged in the indictment. . . . The sentences were not imposed to run consecutively. They necessarily run concurrently, as both offenses are but one transaction, and defendant was not prejudiced thereby."

In People v. Stingley, 414 Ill. 398, an indictment in two counts was returned against the defendant. The first count charged an assault with intent to rape, and the second count charged an assault with intent to murder. Both arose out of the single series of acts committed upon the same victim at the same time and place. The court found the defendant guilty on both counts and sentenced him to a term of 10 to 14 years on each count, the sentences to be served "cumulatively." The defendant contended that

the trial court was without authority to impose two consecutive sentences under a single two-count indictment naming offenses in the same transaction. The Supreme Court took the view that the case raised a question of first impression in Illinois, and cited People v. Quidd, supra, holding that when sentences are imposed to run consecutively the defendant is necessarily prejudiced. The court said at page 404:

> "We think the People, when they elect to prosecute two separate felonies under two counts in the same indictment,are entitled to only one satisfaction. * * *
>
> "It is our holding, therefore, that the sentences of plaintiff in error on the two counts of the indictment are being served concurrently and that the satisfaction of one will satisfy both. [Citing case.] The judgment of the Criminal Court of Cook County is affirmed."

In People v. Schlenger, 13 Ill. 2d 63, the defendant pleaded guilty to an indictment in two counts, the first charging armed robbery, and the second grand larceny. He was sentenced to the penitentiary for a term of 5 to 15 years on the armed robbery count, and sentenced 5 to 10 years on the grand larceny charge, to run concurrently with the first sentence. The court cited People v. McMullen, 400 Ill. 253, which held that where two verdicts were returned and two sentences imposed in a case charging burglary and larceny, since the two sentences must run concurrently, the defendant is not prejudiced. However, in Schlenger, the court held that where the trial court imposed sentences for different periods on each count of the indictment involving the same transaction, the fact that the sentences were to

run concurrently is not controlling because under those circumstances the defendant's application for parole may be adversely affected by the second sentence. The court reversed the judgment on the charge of grand larceny contained in the second count of the indictment and affirmed the burglary judgment.

In People v. Duszkewycz, 27 Ill. 2d 257, cited by the defendant, an indictment in two counts was returned against the defendant; one charging forcible rape, and the other incest. The two offenses involved a single act—the defendant's forcible rape of his 10-year old daughter. The court held that it was proper to join the two charges in a single indictment and try them together since they were both based upon the same occurrence. On the count of forcible rape the defendant was sentenced to the penitentiary for a term of five years; on the incest count the sentence was imprisonment for not less than 19, nor more than 20 years, and the judgment provided that the two sentences should run concurrently. The court pointed out that force and lack of consent are essential elements of rape, but not of incest, and that the relationship between the parties was an essential element of incest, but not of rape. The court said, "The common denominator is the element of unlawful carnal knowledge." The court discussed People v. Stingley, supra, which had held that although consecutive sentences had been imposed they were being served concurrently, and that the satisfaction of one would satisfy both. The court cited People v. Schlenger, supra, stating that in Stingley it was sufficient to hold that the satisfaction of one sentence would satisfy both, while in Schlenger, where different sentences were imposed to run concurrently, the court affirmed judgment for the

greater offense, but set aside the other. In Duszkewycz, the court held that only one sentence should have been imposed, and that it should have been for the greater offense. The court affirmed the judgment of the criminal court upon the count of the indictment charging rape, and reversed its judgment upon the count charging incest.

In People v. Ritchie, 66 Ill. App. 2d 302, the defendant was charged in a two-count indictment with rape and burglary with intent to commit rape. The trial court imposed a sentence of 15 years to life as to each count of the indictment, the sentences to run concurrently. In the opinion the court cited and discussed People v. McMullen, 400 Ill. 253; People v. Stingley, 414 Ill. 398; People v. Schlenger, 13 Ill. 2d 63; and People v. Duszkewycz, 27 Ill. 2d 257. Also cited was People v. Squires, 27 Ill. 2d 518, in which case it was held that where the defendant was charged with both burglary and larceny in a two-count indictment and the larceny charge was the taking of the same merchandise as that taken from the burglarized store, and the defendant was found guilty on each count and sentences were imposed to run consecutively in each count, the larceny sentence was erroneous and was reversed.

In Ritchie the court also cited the Criminal Code of 1961 [Ill. Rev. Stat. 1963, ch. 38, § 1-7(m)], as follows:

> "When a person shall have been convicted of 2 or more offenses which did not result from the same conduct, either before or after sentence has been pronounced upon him for either, the court in its discretion may order that the term of imprisonment upon any one of the convictions may commence at the expiration of the term of imprisonment upon any other of the offenses."

The Committee which prepared the draft of the Criminal Code adopted by the legislature has said in its comments:

> "Subsection (m) is intended to codify the holding in People v. Schlenger, 13 Ill. 2d 63, 147 N.E. 2d 316 (1958), by the implicit converse of the provision stated, i.e., if the offenses resulted from the same conduct the defendant may not be sentenced on both, either concurrently or consecutively. "Conduct" is defined in section 2-4 and is used in the sense of "the same transaction" discussed in Schlenger, supra."

The court further stated at page 314:

> "The indictment in this case includes a count charging rape and a count charging burglary with intent to commit rape. We must conclude that upon the record of this case such counts were presented to and considered by the court as a part of the same conduct or transaction, and that, under the cited decisions and the subsequent statutory enactment, the concurrent sentences imposed are not authorized by law."

The court affirmed the judgment for rape and reversed the judgment for burglary.

In a supplemental opinion on denial of petition for rehearing, the Ritchie court cited and quoted from People v. Golson, 32 Ill. 2d 398, in which case the court said at page 412:

> "To determine, as a matter of legal semantics, that two indictable offenses were committed does not make these multiple trials fair, or vary the fact that defendants were guilty of only one punishable course of conduct."

The court adhered to its former decision.

In People v. Ritchie, 36 Ill. 2d 392, the Supreme Court affirmed the decision of the Appellate Court, and said at page 397:

> "The sense of the opinion appears to be that since the two crimes charged, i.e., rape and burglary with intent to commit rape, arose out of the same conduct or transaction and against the same person it would be unfair and prejudicial to defendant to impose two sentences and therefore it reversed the burglary conviction, relying on People v. Golson, 32 Ill. 2d 398; People v. Squires, 27 Ill. 2d 518; and People v. Schlenger, 13 Ill. 2d 63;and section 1-7(m)of the Criminal Code. Ill. Rev. Stat. 1965, chap. 38, par. 1-7(m)."

However, see People v. Raby, 40 Ill. 2d 392.

In People v. Peery, 81 Ill. App. 2d 372, the defendant was convicted of attempted murder and aggravated battery. For each crime he was sentenced to the penitentiary for a term of not less than five nor more than ten years, the sentences to run concurrently. In that case the court said, at page 377:

> "Defendant was convicted of attempted murder and of aggravated battery, both of which arose from the same conduct. Though this contention was not raised on appeal, under People v. Schlenger, 13 Ill. 2d 63, 147 N. E. 2d 316, concurrent sentences for crimes arising from the same conduct are improper and the conviction of the lesser crime must be reversed. (See also People v. Duszkewycz, 27 Ill. 2d 257, 189 N. E. 2d 299.) Therefore the conviction of attempted murder is affirmed and the conviction of aggravated battery is reversed."

In the case before us, the attempted robbery and the aggravated battery were a part of the same transaction. The defendant demanded complainant's money and threatened to take it, then commenced beating him. Under the rule laid down by the decisions, the judgment of the Circuit Court charging aggravated battery is reversed. The judgment finding the defendant guilty of attempt to commit robbery is affirmed.

REVERSED IN PART,
AFFIRMED IN PART.

LYONS, P.J., and BURKE, J., concur.

No. 68-35

In The

APPELLATE COURT OF ILLINOIS 105 I.A. 2435

Third District

A. D. 1969.

THOMAS HAMMEN d/b/a HAMMEN ELECTRIC COMPANY, Plaintiff, vs. HANSEN & WERHANE, INC., Defendant Third-Party Plaintiff and Appellee, vs. FIDELITY & DEPOSIT COMPANY OF MARYLAND, Third-Party Defendant, Appellant.	Appeal from the Circuit Court of La Salle County Magistrate Division Honorable William Wimbiscus Judge Presiding

Abstract

ALLOY, J.

The instant case originated through a complaint by an electrical subcontractor Thomas Hammen d/b/a Hammen Electric Company (hereinafter called "Hammen") as against the general contractor, Hansen & Werhane, Inc. to recover the balance due under a subcontract. The general contractor then filed a third-party complaint against Fidelity & Deposit Company of Maryland (hereinafter called "Fidelity"). The record indicates that on or about April 1, 1964, the Housing Authority of LaSalle County, Illinois, awarded a $511,940 general contract to Hansen & Werhane, Inc. for the construction of a housing project to be occupied

by elderly persons. The contractor was required by its contract and specifications to furnish a performance bond to the housing authority. Such bond was furnished with Fidelity and Deposit Company of Maryland as surety. On April 1, 1964, the plaintiff in the present action, Thomas Hammen, the electrical contractor, was awarded the electrical contract on the project in the amount of $65,990. The plumbing contract was also awarded in the sum of $140,490. Total contracts for the project were in the sum of $718,420.

The electrical subcontractor was required by his contract and specifications to furnish a performance bond to the Housing Authority. This bond was also furnished with Fidelity and Deposit Company as surety. The Housing Authority on April 1, 1964, assigned both of the subcontracts and the bonds of the subcontractors to the general contractor, Hansen & Werhane, Inc. The electrical contractor began work on his job in April of 1964 and completed his work in June of 1965. He testified that late in the job around the first of the year of 1965, the general contractor requested that he cancel his bond. The record showed that the plumbing contractor had cancelled his bond. The electrical contractor's bond was not, at the time of the request for cancellation, in Hammen's possession since the Housing Authority had delivered it to the general contractor. Hammen then contacted the bonding company representative and requested cancellation. The representative advised that the company would check into the matter and later advised Hammen that the company would not cancel, but that the bond had to stand. The bond remained in full force and the contract was completed. There were no claims under any of the bonds. Hammen had figured the cost of his bond as part of the contract and he agreed with the general contractor that if his electrical subcontractor's bond could be cancelled, the money refunded was to be paid to the general contractor.

The general contractor refused to pay Hammen, the electrical subcontractor, $626.59 on his contract. This was the amount of the bond premium. Hammen then sued the general contractor for this $626.59. The general contractor, as a Third Party Plaintiff, then impleaded Fidelity, the Third Party Defendant, contending that Fidelity was responsible to make the bond refund of $626.59, on the ground that it had wrongfully refused to cancel the electrical subcontractor's bond, and also claimed refund on the basis of a contention that there was double coverage.

Following a hearing in the cause, the trial judge entered a judgment in the sum of $626.59 in favor of plaintiff Hammen, the electrical subcontractor, as against the defendant general contractor, and also entered a judgment in favor of the general contractor against Fidelity for the same amount of $626.59. Fidelity has appealed from such judgment.

The first issue to consider is whether there was sufficient evidence from which the trial court could have concluded that Fidelity had been properly notified to cancel the bond. The record indicates that there was evidence of a request for cancellation around the first of the year of 1965, and that although the bond was never actually returned, the agent for the bonding company advised him that the bond could not be cancelled but would be required to stand. There was, therefore, sufficient evidence of proper notification for cancellation of the bond. Impliedly, nondelivery of the bond was not asserted as ground for the refusal.

The next question is whether there was any legal basis which would justify Fidelity in not proceeding with the cancellation of the bond and the

refund of the premium or the unearned portion of the premium. The record discloses no sound basis for Fidelity not proceeding with the cancellation of the bond. There was no rule or bond provision which required that the premium be retained irrespective of the time when the bond remained in force. There was also no evidence in the record that the bonding company contended that only a specific amount of or a partial refund was required to be made. On the basis of the record before us, if refund was to be made, presumably it was for the unearned premium of the bond.

One issue raised by Third Party Defendant, Fidelity, was that the bond which was in favor of the Housing Authority, also gave rights to laborers and subcontractors and materialmen, and that such bond was, therefore, not subject to cancellation. This contention was framed on the premise that bonds of this character are third party beneficiary contracts and that the third party beneficiaries are materialmen and subcontractors of the electrical contractor (CHERRY v. BENSON, 264 Ill. App. 199; DANVILLE HOTEL CO. v. BENSON, 262 Ill. App. 288). It appears from the record that Hammen had already purchased material and employed certain electricians and laborers before attempting to cancel the bond. Defendant third party, Fidelity, contends that coverage of the bond could not be terminated without the consent of all such suppliers of materials, laborers, employees and any subcontractors of Hammen. To invoke such rule would be contrary to a basic principle pursued by most courts of the nation. As stated in 17 Am. Jur. 2d §317:

> "According to the rule followed in most jurisdictions, the parties to a contract entered into for the benefit of a third person may rescind, vary, or abrogate the contract as they

see fit, without the assent of the third person, at any time before the contract is accepted, adopted, or acted upon by him, and such rescission deprives the third person of any rights under or because of such contract."

It is true that in BAY v. WILLIAMS, 112 Ill. 91, and PLILEY v. PHIFER, 1 Ill. App. 2d 398, there were specific third party creditor beneficiaries and the consent of such third party beneficiaries was required. These cases, however, are not a precedent requiring the consent of all beneficiaries of contractor's bonds. This would involve numerous suppliers and hundreds of employees in many cases and the consent would be nearly impossible to obtain. We do not believe that such rule is sound or should be adopted by the courts of this State. Certainly, no beneficiary whose rights have accrued would be affected by cancellation of the bond since such cancellation would only operate prospectively and affect such parties only in the future following cancellation.

We particularly note that the suppliers and workmen were already protected under the $718,420 bond of the general contractor with Fidelity. Obviously, the general contractor's bond furnished by Hansen & Werhane fulfilled the requirements of the statute. The general bond protected the same persons as were protected under the Hammen bond under the terms of 1963 Illinois Revised Statutes, Ch. 29 §15. The claims resulting from actions of employees of subcontractors were specifically protected under such bond, with Fidelity as the surety. Maintenance of the Hammen bond, therefore, was not required by the statute, under the circumstances (in view of the contractor's bond with the same surety), and could be cancelled by the principal.

Another issue which was raised by Fidelity was whether it is a proper party in the action since it was not a party to the contract with the Housing Authority. Even though the original action was pursuant to the construction contract, the actual controversy involved Hammen's bond premium and the joinder of Fidelity as a third party defendant was proper under §25-(2) of the Civil Practice Act (1965 Illinois Revised Statutes, Ch. 110 §25-(2)). This Act, which specifically provides that a person who is not a party to the action and who is or may be liable for all or part of the plaintiff's claims as against the defendant, may be made a third party defendant by use of a third party complaint.

The contractor, Hansen & Werhane, has asserted in this Court that the circumstance that Fidelity was providing double coverage was alone justification for requiring that a refund of premium should be made. It is true that Fidelity was providing double coverage, but until someone requested that one of the bonds be cancelled, such bonds could properly be kept in force. If both the general contractor and the electrical subcontractor purchased a bond with Fidelity as surety, this would be proper. If the only reason for the claim for refund would be the assertion of double coverage (without a request for cancellation), on the record, such claim would not be sustained, since each party obtained the coverage he paid for, and he could not complain because someone else had overlapping coverage. Since there was, in fact, the coverage required by statute in the present case, however, cancellation of the electrical contractor's bond for the unexpired period thereof (following Hammen's request for cancellation) should have been effected by Fidelity.

In view of our conclusions as set forth in the opinion, it appears that Hammen was entitled to a refund of the prorated premium on the bond to the time of request for cancellation. By agreement, the amount of such recovery was assigned to the contractor. So far as the record is concerned, the bond coverage extended from April 1, 1964, to June 1, 1965. Cancellation was requested and refused around January 1, 1965. Proration of the premium results in the sum of $223.75 being allocated to the period January 1, 1965, to June 1, 1965. The judgment for refund should, therefore, have been entered in the sum of $223.75. The judgment in the sum of $626.59 as against Fidelity is herewith modified and the trial court is directed to enter such judgment in the sum of $223.75.

This cause will, therefore, be remanded to the Circuit Court of LaSalle County with directions to vacate the judgment in the sum of $626.59 as against Fidelity & Deposit Company of Maryland and to enter judgment in favor of Hansen & Werhane, Inc. as against Fidelity & Deposit Company of Maryland in the sum of $223.75. In all other respects the judgment of the Circuit Court of LaSalle County is affirmed.

Judgment modified and cause remanded with Directions.

Stouder, P. J. concurs.

Scheineman, J. dissents without opinion.

NO. 52450

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

WALTER C. OTTO, JR., Executor of the Estate of Walter C. Otto, Sr., Deceased,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County,
	)	First Municipal
vs.	)	District.
	)	Honorable [illegible]
ROY A. KROPP and IRENE U. KROPP,	)	Wilson, Judge
	)	Presiding.
Defendants-Appellants.	)	

Goldenhersh, P. J.

Defendants, Roy A. Kropp and Irene U. Kropp, appeal from the judgment of the Circuit Court of Cook County in the amount of $3,250.00 entered in favor of plaintiff after a non-jury trial.

This action arises out of a claim for services rendered and disbursements by plaintiff's testator, Walter C. Otto, Sr., hereinafter called Otto, a certified public accountant.

The evidence shows that beginning in 1955 and continuing until 1962, plaintiff prepared annual federal income tax returns for defendants, two members of their family, and a trust. Beginning in 1956, Otto also rendered services in connection with Internal Revenue Service audits of defendants' income tax returns for the years 1952, 1953, and 1954. On September 20, 1958, Otto, at defendants' request, withdrew from the tax audit cases and turned over his files and records to a firm of attorneys. On October 20, 1958, Otto submitted to defendants a bill in the amount of $5,000.00 for services rendered in connection with the Internal Revenue Service investigation of defendants' income tax returns for 1952, 1953, and 1954. On the

bill it is stated that the investigation started in [illegible] 1959 and "carried through to September 25, 1959". It [illegible] individuals with whom Otto conferred, and referred to [illegible] audit, analysis of records, various trips, and the preparation of briefs.

In April 1960, Otto resumed performing services for [illegible] in connection with Internal Revenue Service audits of their [illegible] tax returns. Powers of attorney executed by defendants in April 19[illegible] authorize Otto to act for defendants "in connection with any matter involving federal taxes for the calendar years 1952 to 1957 inclusive".

The controversy with Internal Revenue Service ended in a [illegible] promise settlement, and a tax court case covering the [illegible] 1952 through 1957, was terminated on April 25, 1962.

Walter C. Otto, Jr., Executor of Otto's estate, [illegible] defendants had paid Otto for the preparation of the various income tax returns, but had not paid the fees due for services performed in connection with the Internal Revenue Service audits and the tax court litigation. He identified diaries as having been kept by Otto, and from them prepared summaries of the number of hours allegedly spent by Otto in performance of services rendered in these matters.

The parties stipulated that Otto's cash receipts journals show that during the years 1955, 1956, 1957, 1961, and 1962, defendants paid him sums totalling $7,600.00.

Defendants offered, and the court admitted in evidence, [illegible] cancelled checks payable to Otto, totalling $12,400.00. The checks bear dates in 1955, 1956, 1957, 1958, and 1959.

A certified public accountant called by plaintiffs, [illegible]

that a fair and reasonable hourly ch[illegible] performed by Otto was $25.00 per hour.

The trial court, after argument of counsel, [illegible] briefs, stated that he had examined the ledger, [illegible] of work shown therein, computed their value at $25.00 per hour, allowed defendants credit for all payments shown, and entered judgment for plaintiff in the amount of $8,250.00.

This action was commenced on November 21, 1963, and defendants contends that insofar as plaintiff seeks to recover for services rendered prior to November 1950, the claim is barred by the statute of limitations. Plaintiff contends that no part of the claim is barred, because there is an "identifying continuity between all services rendered during the entire period".

There do not appear to be any opinions of Illinois courts of review which involve a limitations issue in an action for services, fees. The situation here is, however, analogous to a claim for attorney fees. In Ennis v. Pullman Palace Car Co., 165 Ill. 113, the rule is thus stated at page 173: "Where an attorney is employed in a single suit, it has been held that the Statute of Limitations cannot commence running, until the services contracted for have been performed by the ending of the suit, or by the termination of the retainer in some other mode."

An annotation at 60 A.L.R. 2d 1003, discusses the question of limitations as applicable to a claim for professional services where the employment is not on a continued retainer. Upon examination of the authorities there collected and discussed, we hold that the evidence shows that Otto's services were rendered [illegible]

a continuous single transaction, i.e. the [illegible] audits and tax court litigation involving [illegible] 1952, 1953, and 1954 income tax returns. Although there was a [illegible] of services performed on these specific matters for the period from September 1958 to April 1960, the employment was [illegible] the period of limitations and continued thereafter until the [illegible] was terminated. Even though the later employment also [illegible] later tax years, there is here a continuity in a single transaction, and the statute did not commence to run until the litigation was terminated.

Defendants contend that the court erred in admitting into evidence Otto's diaries and the summaries prepared therefrom by Walter C. Otto, Jr..

Mr. Otto, Jr. testified that the diaries were kept in the regular course of business and Otto, during his lifetime, had prepared bills based on the hours shown therein. With respect to the diary entries he stated "sometimes it was on a daily basis, sometimes it was not". In our opinion, the diaries were admissible in evidence under Supreme Court Rule 236. We do not reach the question of whether the summaries were properly admitted, because the trial court is presumed to have considered only properly admitted evidence, and the court stated he had examined the diaries, and made no mention of the summaries.

Defendant contends that the trial court erred in excluding from evidence plaintiff's original statement of claim. In the statement plaintiff claimed non-contingent retainer fees and a contingent fee based upon the savings effected as the result of

the compromise settlement [illegible] originally assessed. Subsequent to [illegible] was filed, seeking to recover $26,000.00 [illegible].

We do not decide whether the prior [illegible] have been admitted. If admissible, its only [illegible] show that the claim, as originally asserted [illegible] inconsistent with the allegations of the [illegible] resolution of the issues was for the trial court, [illegible] had read the pleadings. The absence of [illegible] exhibit, assuming its admissibility, [illegible] reversal of a judgment entered by a trial [illegible] jury, presumed to have considered only [illegible] and whose findings are not to be disturbed unless found to be against the manifest weight of the evidence.

Defendants' contention that the judgment is [illegible] weight of the evidence is primarily mathematical. They propose calculations based on the evidence, and argue that they have [illegible] more than plaintiff's maximum provable claim. There is sufficient evidence in the record to support the judgment, and the arguments advanced by defendants do not sustain the burden imposed upon them of showing that the judgment is manifestly against the weight of the evidence. The fact that the trial court could have reached a different result does not warrant reversal.

For the reasons herein set forth the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

Concur: George J. Moran

Concur: Edward C. Eberhardy

1951 A.

STAN KANE,	)
Plaintiff-Appellee,	)
vs.	)
NOMAD MOBILE HOMES, INC., an Illinois Corporation, PAUL SACHS, NORTH CHICAGO, I. C., an Illinois Corporation, and JOSEPH HEIDLINGER,	)
Defendants,	)
PAUL SACHS,	)
Defendant-Appellant.	)

Goldenhersh, P. J.

Defendant, Paul Sachs, appeals from the judgment of the Circuit Court of Cook County in the amount of $14,000.00. The pleadings are summarized, and the prior proceedings reviewed, in Kane v. Nomad Mobile Homes, Inc., 84 Ill. App. 2d 17. In compliance with the mandate of this court, the circuit court entered judgment in favor of Nomad, and against the plaintiff on Count I.

In sections I, VI and VII of his brief, defendant has briefed and argued grounds for reversal on the basis of factual issues which the jury decided favorably to plaintiff. To contend that the court erred in ruling on evidence, and that the verdict is against the manifest weight of the evidence. Further review of these issues is not necessary to this opinion, and these contentions will not be further discussed.

Defendant contends that the president of the corporate defendant,

Nomad, he "could lawfully induce Nomad to [illegible] with the plaintiff to prevent the business of [illegible]."

Plaintiff's case was pleaded and tried on a theory [illegible] approved by the courts of Illinois since the decision of [illegible] v. Hennessy, 176 Ill. 608. The issues as framed by the pleadings and the evidence adduced, presented to the jury the issues of whether there existed a contract between plaintiff and Nomad, defendant's knowledge of its existence, defendant's malice, and its breach as the proximate result of defendant's actions. The verdict found these issues favorably to plaintiff. Defendant, as president of Nomad, had the right to lawfully influence corporate action, but his status does not shield him from liability for his tortious conduct. W. P. Ivers & Co., Inc. vs. Dunham Mfg. Co., 19 Ill. App. 2d 41.

Citing Sachs v. Helene Curtis Industries, Inc., 34[illegible] Ill. App. 75, and Black v. Cosgrove, 3[illegible] Ill. App. 2d 267, defendant argues that he could not legally bind Nomad with a requirements contract, because such contract was unusual and extraordinary. This defense, not pleaded, was not raised in the post-trial motion, and will not be considered on appeal.

Defendant contends that the damages complained of are too speculative to compute, and there is no evidentiary basis for the judgment. The evidence is sufficient for the jury to have found that plaintiff lost the sale of 20 trailers on which his net profit would average $700.00.

Defendant's final contention is that there has been a jury determination that plaintiff's contract with Nomad was not breached, and he cannot, therefore, recover damages allegedly to flow from its

breach. Defendant cites no authority [illegible], but the record does not support his contention. [illegible] effect that there was a breach of the [illegible], [illegible] cause of plaintiff's damages [illegible] the breach. There is no fatal [illegible] requires reversal.

For the reasons set forth the judgment of the Circuit Court of Cook County is affirmed.

Judgment affirmed.

Concur: George J. Moran

Concur: Edward C. Eberhardt